









A  
**Digest**  
OF  
**THE LAWS OF ENGLAND.**

BY  
THE RIGHT HONOURABLE  
SIR JOHN COMYNS, KNIGHT,  
LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

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*The Fifth Edition, Corrected,*  
(WITH CONSIDERABLE ADDITIONS TO THE TEXT)  
AND CONTINUED  
FROM THE ORIGINAL EDITION TO THE PRESENT TIME;  
TO WHICH IS ADDED,  
A DIGEST OF THE CASES AT NISI PRIUS,  
By *ANTHONY HAMMOND, Esq.*  
OF THE INNER TEMPLE.

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VOL. V.  
LIBERTIES—PLEA,  
AND DIGEST OF NISI PRIUS CASES.

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LONDON:  
PRINTED BY A. STRAHAN,  
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;  
FOR JOSEPH BUTTERWORTH AND SON; LONGMAN, HURST, REES, ORME,  
AND BROWN; T. CADELL; J. AND W. T. CLARKE; J. CUTHELL; J. NUNN;  
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WORTH; S. BROOKE; S. SWEET; R. STEVENS; H. T. HODGSON; W. WALKER;  
R. SAUNDERS; G. WILSON: AND WILSON AND SONS, YORK.

1822.



**If**

## LIBERTIES.

If the king incorporate a town, and grant that it shall have such liberties as London, it will be good; for it sufficiently appears what liberties London has. Per two J. 20 H. 7. 6 b. 7 b.

(C) *How lost.*

(C 1.) By nonuser. — When it shall be a forfeiture.

How they may be destroyed by coming back to the king, vide *Franchises*, (G 1, &c.)

When forfeited by breach of a condition in law annexed, vide *Condition* (S 1, 2.) — *Franchises*, (G 3.)

Liberties in which the subject has an interest for common justice, or the common profit, may be forfeited by nonuser: as (a), a liberty of courts may be lost by nonuser.

So, a liberty of a fair, or market. *Manw.* 81.

So, a forfeiture of any franchise or liberty is a forfeiture of every other incident or subordinate claim by the same grant. *Pal.* 82.

As, if a man lose a market, or fair, he shall lose also the court of piepowders. *Ibid.*

But where the franchises in the same grant are several, the forfeiture of one does not lose the other. *Ibid.*

## (C 2.) When not.

But a liberty for the sole profit or pleasure of the owner, shall not be lost or forfeited by nonuser: as, if a man can shew a title to a park, warren, &c. by grant or prescription, he shall not lose it by nonuser. *Manw.* 81.

## LICENCE.

Vide *ALIENATION*, (A 1, 2.) — *CAPACITY*, (B 3.) — *CHASE*, (H 3.) — *FINE*, (E 8.) — *JUSTICES OF PEACE*, (B 26. 100.) — *PLEADER*, (D 1, &c.) — *TRESPASS* (D).

## [LIEN (b).]

(a) All franchises may be lost by nonuser or neglect; and the strongest case of non-user or neglect is, where the parties are called upon, in a court of justice, to state their right, and they neglect or refuse to do it. 2 T. R. 567.

(b) 1. In general.—a lien is a right to possess or to retain. 2 Rose, 355.

2. *Personally*.—General rules. No lien can exist unless by contract, where the amount of the demand can only be ascertained through the intervention of a jury. 15 East, 547.

3. Where evidence of usage is given to shew the existence of a general lien, it must be left to the jury as evidence of mere usage of trade, not of general custom or common law. 2 Smith, 634. 6 East, 519.

4. One who unlike carriers and innkeepers is not obliged to receive a customer's property, may impose what conditions he pleases on the receipt of it; therefore he may stipulate for a lien, for his general balance, on any property sent to him in the course of his business. 6 T. R. 14.

5. The question whether a tradesman has a lien on goods in his hands for the general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend it, the party must shew an agreement or something from which to infer an agreement. 2 Mer. 404.

6. A Banker has a lien for his balance upon all securities in his hand; a rule which holds where, having several bills, he discounts so many as will cover the balance. 5 T. R. 488.

7. So for his general balance on all money securities paid in on the running account. 15 East, 428.

8. Bankers having securities deposited as a pledge for 1,000*l.*, though the depositor, at his death is indebted in a larger sum, have no lien further than the 1,000*l.* 3 B. C. C. 21.

9. Where an author agrees with a bookseller to publish his work, and to allow him interest for the money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright, for his disbursements, *comme sensible*. 3 Anst. 88.

10. Strong evidence is requisite to establish as a usage of trade a lien for a general balance on behalf of carriers. 3 Smith, 221. 7 East, 224.

11. Where by the custom of trade, the consignor pays for the carriage, the consignee's right is paramount to the claim of the carrier to retain for the general balance due from the consignor. 2 N. R. 64.

12. A clause at the end of a *charter-party* of affreightment, that, "the parties mutually bind themselves, especially the ship owners, the ship, her tackle and appurtenances, and the freighter, the goods to be put on board, in the penal sum of 3,000*l.* to be forfeited and paid by the party delinquent to the party observant, to the performance of the matters therein contained;" does not give the party observant a lien upon the property. 3 M. & S. 205.

13. A. consigns a cargo to B. with a direction to pay to C. out of the proceeds a sum of money, and writes C. to that effect, C. has no lien on the proceeds. 2 Rose, 355.

14. There can be no lien for *demurrage* unless by contract. 15 East, 547.

15. The *distraîner* has no lien upon goods taken in distress for rent and replevied, but is left to his remedy on the replevin bond. 1 B. C. C. 427.

16. A *dyer* has no lien on goods delivered to him in the course of trade, but for the price of the dyeing. 4 Burr. 2214. 1 Blk. 651.

17. There are liens which exist only in *equity*, and of which equity alone can take cognizance; but the lien for freight is not one of them. 2 Mer. 403.

18. An order to pay money out of a particular fund, gives the party a specific lien thereon. 3 B. C. C. 64.

19. A bond given for a general purpose of raising money, and deposited by the obligee with another as a security, shall be liable to the obligee's debt: not so if given for a special purpose. 1 B. C. C. 434.

20. Bond by infant for a just debt; his mother and infant sister being entitled on death of A. without issue to 4,000*l.* stock for the mother for life, after to her children, according to appointment, if no children, to the mother, after death of the son, covenanted to pay that debt, when either should become entitled to that stock. Upon marriage of the daughter, the mother made an appointment of the stock in her favour; but next day the husband having notice of, and approving the covenants to pay the son's debt, and reciting his and his wife's intention to secure it "as after-mentioned," released all their right to that stock to the mother, and covenanted, that when the wife should be 21, all their interest should be vested in her; and a trust was declared, that if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards a bill being filed to set aside the settlement as an appointment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it; and the husband covenanted, that if the obligee should have a right in *life of the mother*, to recover the debt, it should be paid out of that stock. The mother died intestate before A. Determined, that a fair assignee of the debt had no specific lien on the fund; which could be liable only by being brought back into the mother's assets, as taken out in fraud of her creditors, for which it must be said, either that there was no pretence for the compromise, or that no pretence for its providing for the debt only, if suable in the mother's life; but the marriage brokerage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground; therefore the common decree for account of assets, debts, and funeral expences, without reference to that fund, was made against the husband and wife as administrators. The debt of the son was a sufficient consideration for the cove-

nants; and if the mother had survived A. there would have been a specific lien. 1 Ves. jun. 314.

21. The *excise* laws only give a lien on those goods that are liable to the duties, and the materials and utensils for making the same; an excise warrant, therefore, to seize the party's goods generally, is bad. 6 T. R. 436.

22. *Freight* is a lien on the cargo. Dougl. 104. No lien, however, for freight, can exist unless freight has been earned; and freight has not been earned until the goods have been regularly brought to the place of destination, pursuant to the contract of affreightment (for performance of such contract waived by the freighter). If the misconduct of the freighter, or a stranger, prevents the freight from becoming due, the ship owner's remedy is by action for damages. 3 M. & S. 205.

23. The lien of the captain for freight continues upon goods impounded in the West India Docks, though he has not given the company notice to retain for his claim. 1 M. & S. 157.

24. Where goods, the property of the consignee, are to be delivered on payment of freight, he may recover them from a stranger wrongfully in possession, without tendering the freight either to him or the master. 3 East, 585.

25. The freighter covenanted to load a complete cargo, paying different rates of freight for the different species of goods, at per cwt., and that in case of not fully lading, he would pay for so much in addition as the vessel would have carried. Held that the owner had no lien on the goods laden for the freight of unoccupied space. 15 East, 547.

26. A. consigns goods to B. abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to A.'s captain, B., stating it to be on A.'s account, as A.'s own goods, and to be delivered to A. The return cargo, consisting of more goods than the proceeds of those consigned to B., B. draws bills on A. for the difference, which he sends to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refuses to accept the bills, and the bill of lading is accordingly indorsed to C. The ship arrives, and C. demands the cargo as indorsee of the bill of lading; the captain however refuses, and delivers them to A., who deposits them with D. as his warehouseman. D. then receives notice from B. to hold the goods for B. as his property, in consequence of which D. refuses to deliver them to A. In trover by A. against D., held that A., having rested his claim on the supposition that the property had vested in him, could not, if he failed in that defence, set up his lien on the goods for freight. 1 Mars. 323. 5 Taunt. 759.

27. A. the owner of a ship, charters her to B. for a voyage from London to the Cape of Good Hope, out and home for 2,200*l.* freight, to be paid one-fourth by bills at two months, one-fourth by bills at four months, from the day of her clearing from London; one-fourth by bills within ten days after her discharge at the Cape; and one-fourth by bills at three months from her return to London. A. binds the vessel and freight, and B. the goods for due performance. The ship arrives at the Cape, discharges her cargo, and takes in a return cargo, consisting partly of goods of different persons on freight, and partly of seventy pipes of wine, consigned to B., of which eighteen pipes are shipped on the 3d May, fourteen on the 5th, and thirty-eight on the 8th. B. commits an act of bankruptcy on the 5th of May. The bills for the two first instalments are dishonoured; the third instalment is paid, but no satisfaction for the last. The ship arrives in London, and A. claims a lien on the wine for the hire of her. Held, that the ship being chartered for the voyage, B. was owner, *pro hac vice*, and therefore that A. had no lien on his goods. *Quære*, whether the agreement for the hire of the ship was such as would have destroyed A.'s right to a lien? *Quære*, also, whether A. could have claimed a lien on those goods which were shipped on the day of, but after, the act of bankruptcy? 2 Mars. 339. 7 Taunt. 14.

28. Though the finder of property *lost* may be entitled to a compensation from the owner for his care of it, yet he has no lien for such compensation. 2 H. Bl. 254.

29. There is no lien on a dog lost for the expence of his keeping. 2 Blk. 1117.

30. But a man has a lien for salvage upon the thing saved. Ld. Rd. 393.

31. It seems that a clerk of assize has not a lien on the records in his custody for his fees. Leach, 239.

32. And if he refuse to deliver a record on the ground of non-payment of fees for drawing, engrossing, &c. K. B. will grant a rule *nisi* for attaching him. Ibid.

33. Bill, following life insurances, effected by the plaintiff's clerk with the plaintiff's money, procured by embezzlement, and transferred to the defendants for valuable consideration, but with notice. Demurrer allowed; the transaction amounting to felony by the statute 39 Geo. 3. c. 85. and therefore not raising a civil contract. Secondly, the policies not being the plaintiff's property. 17 Ves. jun. 329.

34. A *respondentia* bond, reciting that the money was lent upon the goods laden and to be laden, which is conditioned to be void in case of repayment after the ship's return,  
or

or in case of loss, should pay a proportionable average on all the goods carried out and acquired during the voyage which should be saved, confers no lien on the goods. 4 East, 319.

35. The vendor has no lien on the property after a constructive delivery. 1 Taunt. 458.

36. Priority, as between a person who has an equitable lien and a third person who purchases the thing for a valuable consideration and without notice, the title of the vendee shall be preferred. 2 T. R. 485.

37. A tradesman, a printer for example, engaged to supply one entire work, has a lien for the price, or the balance due, upon every individual parcel of it; so that after delivering a part, he may retain the residue for such price or balance. 3 M. & S. 167.

38. Whether a work be entire or not depends upon the original contract and understanding of the parties. If the understanding is that it shall be considered entire, the delivering parts of it from time to time, and charging separately from each parcel, will not change its original nature. 3 M. & S. 167.

39. Assignment. — A lien is a personal right, and cannot be assigned to another. 5 T. R. 606.

40. Continuation. — The assignee of a policy on goods by indorsement of the bill of lading, takes it, subject to the same lien as existed against the assignor. 2 East, 523.

41. Determination. — A lien upon property in specie is not continued on the proceeds thereof, when sold, where the sale was unauthorized. 10 East, 378.

42. An offer by the debtor of, "I am not aware of the exact balance, but if any be due I am ready to pay it, on receiving back the security;" will not defeat an action brought by the holder of the security, entitled to sue in respect of his lien thereon. 15 East, 428.

43. A lien exists during such time only as the party has possession, either by himself or his agent, of the property; if he parts with the possession after the lien has attached, the lien is gone. 1 East, 14.

44. A consignee, parting with the goods consigned, parts with his lien on them. Dick. 269.

45. Factor's lien, both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So in various trades. 16 Ves. 280.

46. A party having a lien on a policy does not lose his lien thereon, or on the proceeds when recovered, by depositing it with a broker. 2 East, 523.

47. Miscellaneous. — The court will not interfere to settle the relative rights of two co-defendants to muinments on which the plaintiff has a lien, so as to secure him in delivering them over. 7 Taunt. 391. 1 Moore, 99.

48. Real property — Vendor and purchaser. A purchaser of a settled estate (without notice of a rent-charge granted by tenant for life) transfers stock to the trustee under the settlement, in payment: the tenant for life grants an annuity to one who had no notice of the transaction; the purchaser of the estate is evicted by the grantee of the rent-charge; he has no lien on the stock transferred. 1 B. C. C. 301.

49. A. purchases an estate of B. without notice of a rent-charge; the vendor covenanting that there are no incumbrances, the purchase money is laid out in the funds; and B afterwards sells the dividends for his life, secured by letters of attorney to C. who has notice; A. is evicted by the grantee of the rent charge. He has no lien on the funds purchased against C. 2 B. C. C. 282.

50. Lien of vendee having paid prematurely, analogous to that of vendor. 15 Ves. 345.

51. If the vendor of an estate take the purchaser's bond as a security for the purchase-money, and the purchaser become insolvent, the vendor hath no lien on the estate for the consideration-money, but must abide by his security. Dick. 485.

52. A purchaser not having paid the money, laid down *arguendo*, but not determined, that the vendor has a lien upon the land. 1 B. C. C. 420.

53. Under the usual condition at an auction, that if the vendee should fail to complete his purchase the vendor should be at liberty to resell; and the vendee pay the expenses and make good the deficiency, &c. 6 Ves. 94.

54. Vendor's equitable lien upon the estate for the purchase money lost by taking a special security by way of a pledge of stock. Whether every security would have that effect, *Quære*. 6 Ves. 752.

55. Whether the vendor's lien could prevail against an equitable mortgage by deposit of deeds, *Quære*. 6 Ves. 752.

56. Vendor's lien upon a sale of real estate. 12 Ves. 383.

57. Vendor's lien for purchase money unpaid against the vendee, volunteers and purchases with notice, or having equitable interests only, claiming under him; unless clearly relinquished; of which another security taken, and relied on, may be evidence; and accord-



ding to the circumstances, the nature of the security, &c.: the proof being upon the purchaser; and failing in part, upon the circumstances, another security being relied on may prevail as to the residue. As to marshalling the assets of the vendee by throwing the lien upon the estate, *Quære*. 15 Ves. 329.

58. Vendors lien probably derived from the civil law as to goods; which goes further than the law of England; by which the lien, giving the right to stop *in transitu* is gone; where possession, actual or constructive, has been taken, the lien by the civil law prevailing even against actual possession. 15 Ves. 344.

59. Vendor's lien for the purchase money: lien upon goods in different trades for work upon them, for the general balance; and as to the effect of taking security. 16 Ves. 278.

60. After judgment against the purchaser of a leasehold house and furniture; lien of the vendor upon the house and furniture, and proof under a commission of bankruptcy against the purchaser for the deficiency. 19 Ves. 235. 1 Rose, 306.

61. *Quære* whether the vendor of an estate who takes the bond of the vendee for the purchase money, has a lien on the lands for the purchase money remaining unpaid. 1 Cox, 91.

62. *Quære* whether the vendor of an estate, who takes the bond of the vendee for the purchase money, has a lien on the lands for the purchase money remaining unpaid. 2 Cox, 90.

63. Purchase money unpaid, is *primâ facia*, a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to show that the vendor agreed to rest on that security and to discharge the lands. Sch. & Lef. 132.

64. A note passed by a vendee to a trustee for part of the purchase money, out of the amount of which incumbrances then not ascertained were to be satisfied, and the balance only paid to the vendor, is not such a security as will discharge the lien on the lands. 1 Sch. & Lef. 132.

65. Vendor's lien on the estate for the purchase money not discharged by taking bills of exchange; which are to be considered, not as a security, but a mode of payment. 2 Ves. & Beam. 306.

66. As to the effect of a security of a third person upon the vendor's lien on the estate for the purchase money, *Quære*. 2 Ves. & Beam. 309.

67. Vendor has a lien on estate sold, for his purchase money, though he has received bills from the vendee in payment of the same, and though the vendee becomes bankrupt. 1 Mad. 346.

68. On a contract for sale of an estate, where, by the terms of the contract, the purchaser is to be let into immediate possession, and a question afterwards arises as to a part to which no title can be made, the vendor cannot turn the purchaser out of possession, and retain to himself the benefit of the contract. 3 Mer. 144.

69. Lien by vendor on property of which the vendee never took possession. 1 Rose, 306.

70. Vendor held not to have waived his lien on the estate sold by taking the promissory note of the vendee and receiving its amount by discount. 2 Rose, 79.

71. General principle of the marshalling; that a party having two funds, his choice shall not have the effect of disappointing another who has one only; but the latter shall stand in the place of the former. Upon that principle the benefit of the vendor's lien on the estate for the purchase money extended to third persons. 9 Ves. 209.

72. Distinction between a judgment, as attaching upon the land, and a special agreement for a security upon the land. 15 Ves. 354.

73. Specialty creditors have no lien on the estate, and therefore the alienee of a devisee shall hold the land discharged. 2 Anst. 506.

74. A covenant to apply a certain portion of rents and profits to a particular use, gives a specific lien upon the estate. 5 B. C. C. 421.

75. Covenant to set apart and pay annual profits of land, is in equity a lien on the land against the covenantor and claimants under him with notice. 1 Ves. 477.

76. A party entitled as equitable tenant in tail under a settlement in which is a covenant to convey lands to the uses of such settlement; afterwards and upon his own marriage covenants also to convey lands of less value; though he obtains a decree for the execution of the first mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. Cooper, 301.

77. On bill of interpleader by the owner of an estate against the grantee of a rent charge out of it, assigned to secure an annuity and the annuitant, the annuity being void, the arrears of the rent charge in court were paid to the original grantee; and the annuitant was held not entitled to have the consideration repaid out of that fund, there being only a general debt at law and no lien. 2 Ves. 138.

78. A fine paid for the renewal of a lease, by one of two tenants jointly holding see lands; a lien on the other moiety, though under settlement. Ball & Beatty, 199.

79. Lien

## LIEN.

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79. Lien upon a West India estate, for supplies furnished by tenant for life, tenant in common, &c. 14 Ves. 444.

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(A) Its

## (A) Its antiquity and extent.

Tacitus says of London, *quod tempore Neronis fuit copia negotiatorum, & commeatu maxime celebre.* 4 Inst. 247.

The city of London being destroyed by the Danes, *an.* 839, was restored and encompassed with walls by king Alfred, *an.* 886, which having been often repaired were rebuilt *an.* 1477, from the Tower to Aldgate, and so to Bishopsgate, and so to Cripplegate, then Aldersgate, Newgate, Ludgate, and to Fleet-ditch, and so to the Thames, 643 perches, viz. above two miles in circuit. 1 Stow, 9. 11, 12.

The antient wall passed through the tower, for which reason all within the tower that lies upon the west part of the wall is within the city of London, and all upon the east part lies in the county of Middlesex. 3 Inst. 136.

Before the time of H. 3. the city was divided into 24 wards, whereof Portsoken lies *extra murum*, Bishopsgate, Cripplegate, Aldersgate, and Farringdon, in part *extra*, in part *intra murum*. 1 Stow, 347.

By parliament, 17 R. 2. Farringdon *extra* was severed from Farringdon *intra*, and made a distinct ward. 1 Stow, 347.

By charter 1 Ed. 3. made and approved in parliament, the king granted to the citizens and their successors the vill of Southwark *cum pertinentiis*, *solvendo* the usual farm. 2 Stow, 3. Vide Priv. Lond. 14.

By patent 4 Ed. 6. the king granted to them his manor and borough of Southwark *cum pertinentiis in com.* Surrey, the messuages and lands near the borough of Southwark purchased by H. 8. of Ch. duke of Suffolk, except Southwark place and park, the prisons of the King's Bench and Marshalsea; *et quod inhabitantes de Southwark sint sub gubernatione*, &c. of the city as citizens and inhabitants of London. 2 Stow, 4. 6. Vide Priv. Lond. 20.

After that grant, by an order of the court of mayor and aldermen, confirmed by the court of common council, the last day of July, 4 Ed. 6. Southwark was constituted the twenty-sixth ward; by the name of Bridge Ward without. 2 Stow, 6.

By agreement with the earl of Cornwall confirmed by charter 26 Feb. 31 H. 3. Queenhithe, with all liberties, is granted to the mayor and commonalty of London, and their successors, rendering 50l. *per annum*. Vide 1 Stow, 699. & Priv. Lond. 9.

By charter 18th October, 14 Car. the king grants to the mayor, commonalty, and citizens of London, the Moorfields outer and inner, and West Smithfield. Vide Priv. Lond. 27.

## (B) Extent of its Jurisdiction.

Portsoken ward (which extends from Aldgate to the bars near Whitechapel, and from the house of lord Bouchier near Bishopsgate to that place in the Thames, to which an horseman, riding into it at low-water, can throw his spear) imports the franchise *ad portam*. 1 Stow, 348.

This ward was granted temp. Edgar to thirteen knights to have the land, with liberty of a guild *in perpetuum*, and was by them granted to the

the canons of the Holy Trinity, temp. H. 1. *an.* 1115, within the walls of the city. 1 Stow, 348.

The prior of that house was from thence admitted as an alderman of the city to have the government of that ward and soke; and since the dissolution, the alderman is elected, as other aldermen, by the citizens. 1 Stow, 349.

And therefore, the east part of the Tower, St. Catherine's, East Smithfield, (Qu. as to St. Catherine's, East Smithfield, and part of Tower-hill,) Tower-hill, the Minories, storehouses, and St. Botolph's parish, which lie in that ward, are within the liberty of the city towards the east. Vide 1 Stow, 349, &c.

So, in Bishopsgate ward, from the gate to the bars *juxta* St. Mary Spittle and half Houndsditch, in this ward, is part of the suburbs, and within the liberty of the city. Vide 1 Stow, 421.

In Cripplegate ward, Fore-street from the north of St. Giles's church through Moor-lane to Postern lane end near Moorgate, with all houses, gardens, and alleys to Moorfields near Finsbury court, the alleys and buildings about Moor-lane, part of Grub-street, Whitecross-street, to the end of Beech-lane, Redcross-street up to the posts in Golden-lane, and part of Barbican are *extra murum*. Vide 1 Stow, 582.

In Aldersgate ward, *extra murum* are Aldersgate-street as far as Barbican and Long-lane, and Goswell-street, to the bars. Vide 1 Stow, 601.

Farringdon ward *extra*, Newgate and Ludgate extends towards the west to the bars in St. John-street, the bars in Holborn, and Temple Bar. Vide 1 Stow, 711.

By charter 4 Ed. 6. the mayor, commonalty, and citizens of London, shall have like jurisdiction, &c. in Southwark, &c. as in London. Vide 2 Stow, 4. 6. and Priv. Lond. 22. Vide *ante* (A).

By charter 20 September 6 Jac. the jurisdiction of the mayor, commonalty, and citizens of London, shall extend through the several circuits, &c. of Duke's-place, great St. Bartholemew, and little St. Bartholemew, Blackfriars, Whitefriars, and Cold Harbour. Vide Priv. Lond. 24.

So, by grants from ancient kings the mayor, commonalty, and citizens of London have the property of the Thames, *tam soli quam aquæ*. (Vide 1 Stow, 35.)

By charter 8 R. 1. and 1 John, all weirs, &c. in the Thames and Medway shall be amoved. Vide 1 Stow, 36. and Priv. Lond. 5, 6.

And thereupon the mayor and commonalty of London, time out of mind, have had the conservation and regulation of the Thames, and the lands thereby overflowed, from Staines bridge in the county of Middlesex, to the waters of Yendall and Medway, and the punishment of unlawful engines, &c. And this confirmed by charter 3 Jac. &c. 1 Stow, 34. 4 Inst. 250. 1 Sid. 148.

[St. 14 G. 3. c. 91. and 17 G. 3. c. 18. grant powers to the lord mayor, &c. to improve the navigation of the Thames westward, and to purchase tolls, and to lay a toll.]

Vide Courts, (O 1, &c.)

## (C) Mayor.

By charters 16 John and 11 H. 3. the barons of London may yearly choose a mayor fit for the government of the city, so as he be presented to us, or, if absent, to our justices, and sworn to be faithful to us. Vide 2 Stow, 186. &c. 450. &c. and Priv. Lond. 6, 7.

By charter 37 H. 3. to the king, or, if absent, to the barons of the exchequer at Westminster. And by charter 26 Ed. 1. if the king and barons be absent, to the governor of the Tower. Vide 2 Stow, 186, &c. 450. &c. and Priv. Lond. 9. 11.

Before and since the Conquest, to the time of R. 1. London was governed by a port-reeve, and 1 R. 1. by two bailiffs, and afterwards by a mayor appointed by the king, but 10 John the king granted *quod cligant* a mayor *de seipsis* annually. 2 Inst. 253. Vide 2 Stow, 450.

By charter 1 Ed. 3. the mayor of London shall be named in every commission for gaol-delivery of Newgate: and shall do the office of escheator within the liberties of the city, so as he take oath to exercise the office, and to answer to the king as he ought. Vide Priv. Lond. 12, 13.

By charter 2 Ed. 4. the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace within the city; and they or four of them, *quorum* the mayor to be one, shall be justices of oyer and terminer there. Vide Priv. Lond. 16.

By charter 14 Car. they, or the aldermen, not mayors, shall be justices, and four of them, *quorum* the mayor or recorder to be one, may hold a sessions. Vide Priv. Lond. 26. Vide post, (K 6.)

[The jurisdiction by 1 J. 1. c. 22. concerning leather cutters, is not in the mayor personally, but as the head of the court of sessions. 1 B. M. 385.] (c)

[The lord mayor's watermen are not, as such, privileged from being impressed; but though not exempted, it would be an abuse of the right, to press them, if they were in the act of rowing the lord mayor in his barge. Cowp. 512. 518.]

## (D) Aldermen.

The aldermen of London were annually chosen, till by charter 28 Ed. 3. it was granted, that they should not be removed without cause; and by the st. 17 R. 2. 11. it was enacted, that they should not be (vide the st. 11 Geo. 18. as to their election) chosen annually, but remain till removed for cause. 4 Inst. 253.

But the king by charter may exempt the officers of the mint, that they shall not be an alderman, or other officer there, and then they cannot be fined for refusal. R. 1 Sid. 288.

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(c) 1. A condemnation by the majority of the triers assembled under this statute, is binding. 1 B. & P. 229.

2. The searchers are not justified in seizing leather, which in point of fact is well and thoroughly dried within the meaning of the act, although in their own judgment it may not be so. 6 T. R. 445.

3. Nor does the right of seizure apply against purchasers, though for re-sale, unless of a trade mentioned in the act, but only against the original maker. 3 East, 334. 2 N. R. 589.

## (E) Re-

**(E) Recorder.**

If the custom of London be denied, it shall be certified by the mayor and aldermen by the mouth of the recorder, and a writ goes to the mayor to certify, except where the city is concerned in interest. 2 Inst. 126.

Vide Certificate, (B).

**(F) Common Council.**

A court is held at Guildhall before the mayor, aldermen, and common council (vide the st. 11 Geo. as to their election, &c.) whenever the mayor appoints. Vide Priv. Lond. 350.

The mayor and aldermen sit by themselves, and the others, who represent the commons of the city, by themselves. 4 Inst. 249.

The court of common council makes all bye-laws, which bind within the city and the liberties. Ibid.

So, they annually choose a committee of six aldermen and twelve commoners for leasing the lands of the city; four aldermen and eight commoners for the mangement of the lands given by Sir Thomas Gresham; a governor, deputy governor, and assistants for the management of the city lands at Ulster in Ireland. Vide Priv. Lond. 350, 351.

So, they elect to the offices of common serjeant, town clerk, and common crier. Vide Priv. Lond. 352.

No alien shall be admitted to the freedom of the city, without their assent. Vide Priv. Lond. 352.

**(G) Sheriffs.**

By charter H. 1. the citizens of London shall hold Middlesex in farm at 300*l.* per annum, so as they place as sheriff, whom they will of themselves. Vide 2 Stow, 450, &c. and Priv. Lond. 3.

By charter 1 John, the king grants and confirms to them the sheriffwick of London and Middlesex, with all customs belonging within the city and without, by land and by water, paying 300*l.* per annum at the Easter and Michaelmas exchequer. Vide 2 Stow, 450, &c. and Priv. Lond. 5.

But by charter 11 H. 3. *vicecomites respondeant ad Scaccarium de hiis que ad dictum vicecomitatum pertinent.* 4 Inst. 252.

**(H) London is a county, and a corporation by prescription.**

London is a county of itself. 4 Inst. 248.

So, London is a corporation by prescription, known by several names. 2 Inst. 330. Quo. W. *sparsim.*

**(I) Chamberlain.**

The chamberlain of London is an officer chosen annually [by the livery]. Vide Priv. Lond. 302.

And

And this officer is a corporation sole by custom, who may take a recognizance, obligation, &c. for money when it belongs to an orphan, or to a matter under his care; which goes in succession, and not to his executor or administrator. R. 4 Co. 65. Vide Guardian, (G. 1, &c.) —Biens (C.)

And the successor by custom may sue the obligation, or upon such a recognizance direct a precept, in the nature of an *elegit*, to a serjeant at mace of his court; who shall thereupon do execution according to the st. W. 2. 18. R. 4 Co. 65.

By charter of 28 Ed. 3. the serjeants at mace in the city may bear them of gold or silver, or silvered, with our arms, in the city or suburbs in Middlesex and other places belonging to the liberties of the city. Vide Priv. Lond. 14. 4 Inst. 252. (d)

## (K) Offices granted.

### (K 1.) Office of package.

By charter 18 Ed. 4., confirmed by parliament 3 H. 8., the king granted, for a debt of 7,000*l.* remitted to the king by the city, to the mayor and commonalty and their successors, the offices of packing all clothes, skins, and other merchandizes within the liberties of the city, as well denizens as aliens, and the oversight of opening all merchandizes customable, brought to the port of safety by land or water. Vide Priv. Lond. 19.

### (K 2.) Portage.

So, by the same charter, Ed. 4. granted to them the carriage and portage of all wools and other merchandizes carried in London from the Thames to any strangers' houses, *vel retro.*, and of other merchandizes to be carried, being in any house for a time. Vide Priv. Lond. 19.

### (K 3.) Garbling.

So, by the same charter, Ed. 4. granted to them the garbling of all spices, and other merchandizes that ought to be garbled. Vide Priv. Lond. 19.

### (K 4.) Gauger.

So, by the same charter, and by charter 20 H. 7., was granted to them the office of gauger within the city; and the ordering and correction of the same, with all fees, &c. without account. Vide Priv. Lond. 19.

(d) *Citizens.* As well in London as in other places, freemen are not therefore citizens unless residents. 4 T. R. 144; reversing judgment of C. B. in S. C. 1. H. B. 206. Id. 216.

*King's waiters.* Under st. 38 Geo 3. c. 86. there is no *jus accrescendi* amongst the surviving patentees of the office of king's waiters in the port of London. 12 East, 273.

*Suburbs.* Old-street is within the suburbs of the city of London. Cowp. 624.

### (K 5.) Wine-



## (K 5.) Wine-drawer.

So, by the charter 18 Ed. 4. the king granted to them the office of wine-drawers, to provide for carrying all wines brought to the port of the city, and laid on land, or elsewhere to be carried. Vide Priv. Lond. 19.

## (K 6.) Justices of peace, coroner, &amp;c.

By the same charter Ed. 4. granted to them, that they make coroner of the city whom they please. Vide Priv. Lond. 19.

So, by charter 2 Ed. 4., the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace of the city, as well by land as by water. So, by charter 6 Jac. & 14 Car. 1., they and the aldermen who have not been mayors, &c. Vide ante (C.)

And they or four of them (Qu. one is mayor) shall be justices of oyer and terminer within the city and liberties, to determine all things belonging to justices of peace. Vide Priv. Lond. 16.

So, by charters 6 Jac. & 14 Car. they and the aldermen, not mayors, whereof four (of whom the mayor or recorder to be one) may hold sessions. And the sheriffs, &c. shall be attendant, &c. Vide Priv. Lond. 24. 26.

## (K 7.) Office of the great beam, weights, and tronage.

So, by charter 22 H. 8. the king granted the office of keeper of the great beam and common balance or weight within the city of London, for weighing all merchandizes of avoirdupois, and also all weights, to the mayor, commonalty, and citizens of London, and their successors; and they shall have tronage, viz. the weighing wax, lead, pepper, &c. and like wares for ever. Vide Priv. Lond. 20.

And the charters 12 Ed. 2. and 1 H. 4., to the same effect, are confirmed, and they seem to have had it time out of mind, &c.

By charter of H. 3. no stranger shall buy goods till weighed at the king's beam, on pain of forfeiture. Vide Priv. Lond. 10.

And therefore a bye-law, that a foreigner who sells goods usually sold by weight shall pay 13s. 4d. for every five hundred weight, if he does not bring them to the city-beam to be weighed, will be good. R. 1 Lev. 15. 1 Keb. 32. 35. 39.

So, by charter 1 H. 4. the citizens shall have the office of gathering the tolls and customs in Cheap, Billingsgate, and Smithfield; and tronage, viz. the weighing of lead, wax, pepper, &c. and like wares within the city for ever. Vide Priv. Lond. 15.

By charter 3 Ed. 4. the king granted to the mayor, commonalty, and citizens the tronage, weighing, measuring, and laying up of all wool which shall be at Leadenhall, and no other place within three miles. Vide Priv. Lond. 18.

## (K 8.) Custody of the gates, &amp;c.

So, by charter 1 H. 4. the citizens of London shall have the custody of Newgate, Ludgate, and all other gates and posterns in the city. Vide Priv. Lond. 15.

## (L) Exemptions granted.

### (L 1.) To be free of toll, &c.

By charter H. 1. all the men of London, and all their goods, shall be free from scot and lot, danegilt, and murder; and from all toll, passage, and lestage, and all other customs through all England and the ports of the sea. So, by charters 11 H. 3. and 50 H. 3. Vide 4 Inst. 252. (e)

So, by charter H. 2. and 1 John; and also that they shall be free from bridgtoll, childwite, jeresgive, and scotale. Vide Priv. Lond. 4.

So, by charter 26 Ed. 1. from pontage, pannage, and murage through the kingdom, and all our dominions. Vide Priv. Lond. 11.

So, by charters H. 1., H. 2., and 1 John, none of the citizens of London shall wage battle. 4 Inst. 252.

### (L 2.) Excused from juries, &c.

So, by charter 2 Ed. 4., aldermen, while they continue so, and those that have been so and have also been mayor, shall not be put in assizes, juries or attaints, recognizances, or inquisitions out of the city. Vide Priv. Lond. 16.

[A jury of citizens may waive their privilege, and consent to be sworn on a trial at bar in Middlesex. 2 Wils. 136.] (f)

### (L 3.) And from suits out of the city.

So, by charter 1 H. 1. the citizens of London shall not plead out of the walls of the city in any plea.

So, by charter H. 2. and 5 R. 1., except pleas of foreign tenures, the king's moneyers, and ministers.

So, by charters 1 John, and 11 H. 3., and 1 E. 3. Vide Priv. Lond. 3, 4, 5, 8, 14.

So, by charter 1 Ed. 3. no freeman shall be impleaded at the Exchequer, or elsewhere, by bill, unless it concern us or our heirs. Vide Priv. Lond. 14.

### (L 4.) Excused from offices.

So, by charter 1 Ed. 3. 9. the citizens shall not be compelled to go or send to war out of the city. Vide Priv. Lond. 13.

(e) 1. Houses, built on lands embanked from the *Thames* in pursuance of the stat. 7 Geo. 3. c. 27. which vests those lands in the owners free from taxes, are not liable to be assessed to the general land-tax imposed by the stat. 27 Geo. 3. though such act is conceived in general terms, and is subsequent in point of time to the act creating the exemption. 4 T. R. 2.

2. Such houses are not liable to be assessed to rates made under the stat. 11. Geo. 3. c. 29. 4 T. R. 4.

3. Such houses are not exempt from the payment of the house and window duties imposed by stat. 38 Geo. 3. c. 40. 8 T. R. 468.

4. Freemen of the city of London have a right to be exempt from the payment of all tolls throughout England (except the prizes of wines) in whatever place they reside, and though they have obtained their freedom by purchase. 1 H. Bl. 206.

(f) An alderman of London is exempt from serving the office of constable. Dougl. 538.

Nor,

Nor, by charter 2 Ed. 4., shall aldermen be made collectors, assessors, &c. of tenths, fifteenths, taxes, subsidies, or other impositions granted to us or our successors; and if elected, shall forfeit nothing by refusal, &c. Vide Priv. Lond. 16.

### (M) The privileges and customs of London are confirmed by parliament

By the st. M. Ch. 9 H. 3. *civitas London habeat omnes libertates suas antiquas & consuetudines suas.*

By the st. 7 R. 2. Rot. Par. nu. 37. (not printed) the citizens of London shall enjoy all their liberties whatsoever, *licet usi non fuerunt vel abusi*, and notwithstanding any statute to the contrary: so that they may claim liberties by prescription, charter, or parliament, notwithstanding any statute made before 7 R. 2. 4 Inst. 250. 253.

But this is intended of franchises, that are by lawful title, and not forfeited, and franchises and customs sufferable by, and not repugnant to law. 2 Inst. 20.

And therefore, a custom to imprison for abusive words to a mayor or alderman out of court is not good. R. Cro. El. 689.

And though the customs and privileges of London are confirmed by parliament, the king by charter may exempt a person from being an officer there: as, to the officers of the mint, that none shall be mayor, escheator, sheriff, or other officer there. R. 1 Sid. 288.

But a custom, that the watchmen at the custom-house shall be exempt from the office of constable, is not good. 1 Sid. 272.

[The court cannot judicially take notice of a custom of London, there must be affidavit of it. 4 B. M. 2032.]

### (N) Customs of London.

#### (N 1.) In actions and suits.

By the custom of London, an action of covenant lies, without a speciality. Vide 22 Ed. 4. 2. a. and Priv. Lond. 149. Vide Courts, (O 1, &c.)

So, debt lies in London upon a *concessit solvere*. Vide Priv. Lond. 146. & 1 H. 7. 22. a.

And lies against an executor upon a simple contract. 1 Ed. 4. 6. b. 8 Co. 126. a.

And also against an administrator; for he was suable as executor before the st. 31 Ed. 3. 11. R. Cro. El. 409. 5 Co. 82. b.

So, debt lies against pledges by parol. 43 Ed. 3. 11. b. 1 Ed. 4. 6. a.

So, by the custom of London after a plaint entered in the compters, a serjeant may arrest, without process. 9 Co. 68. Cro. Cor. 196.

After a debt levied before the sheriff in his court, the sheriff may direct the serjeant *ore tenus* to summon or attach the defendant without warrant, and upon *nihil* returned to arrest, *ad habendum corpus* at the next court.

So, by custom, debt lies by an obligor who pays the whole debt  
against

against the other obligor for his proportion. Vide Priv. Lond. 148. and Mo. 136.

So, for lands in London, an action lies in London, and not elsewhere. 4 Inst. 247.

And it cannot be removed by toll or pone. 2 Inst. 324.

But upon a foreign voucher by the st. Glo. 12. there shall be a summons *ad warrantizandum*. 2 Inst. 324. Vide Courts, (O. 2.)

So, upon a plaint against A. in the sheriff's or mayor's court, upon a suggestion that B. is indebted to A., and process against B.; if he does not deny the debt, it shall be attached in his hands for satisfaction of the debt, by A. 22 Ed. 4. 30. [2 Bl. 834. 3 Wils. 297. Dougl. 378. 4 T. R. 312. Vide Attachment, (A.)]

And this recovery by foreign attachment may be pleaded by B. in an action against him for the debt, or given in evidence upon *non assumpsit*. Vide Attachment, (H—I.)

So, if a judgment be against A. in the sheriff's court upon which A. was in execution, and afterwards A. is removed by *habeas corpus*, upon which this judgment is returned, and he is committed to the marshal of B. R. charged with a judgment there and in London; A. pays the judgment in B. R., and the judgment in London is reversed in the hustings; A. shall be remitted to London to be discharged there, for B. R. has no knowledge of the judgment in London, except by the return upon the *habeas corpus*, and cannot remove the record from London by *certiorari*. R. Cro. Car. 128.

[An action against a feme covert as sole trader cannot be removed by *habeas corpus* from the city courts. 2 Bl. 1060.]

[In the city courts they take notice of their own customs without proof; but the superior courts in Westminster Hall cannot take notice of the customs of London, unless they are certified or proved. Dougl. 378.]

[And for the manner in which such customs are certified, see 1 Burr. 248. (g)]

## (N. 2.) In regard to apprentices.

By the custom of London, every one above 14, and under 21, may bind himself apprentice to a freeman of London, by indenture for seven years, and shall be compelled to serve. Pal. 361. 2 Rol. 305.

Though bound at York, or elsewhere out of the city. Mo. 136. Semb. cont. 2 Bul. 193.

So, the widow of a freeman may take for her apprentice any woman for seven years. Vide Priv. Lond. 307.

So, a sempstress, or other, the wife of a freeman; but she shall be bound by indenture to the husband. Ibid.

So, the apprentice may be bound for eight, nine, or ten years. Ibid.

If the apprentice departs from his service, or breaks the common covenants in the indenture, an action lies against him, though he be an infant, by the custom of London. Vide Priv. Lond. 108, 109. and Pal. 361. 2 Rol. 305.

So, by the custom of London, every indenture of apprenticeship ought

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(g) The custom of foreign attachment has been certified. Dougl. 378.

to be inrolled within a year before the chamberlain. Vide Priv. Lond. 107. 303. Pal. 361. 2 Rol. 305.

And the apprentice ought to be present at the time of inrolment. Pal. 361. 2 Rol. 305.

If the apprentice refuse to appear to be inrolled, the master may record the indenture, which will be tantamount. Vide Priv. Lond. 305.

If the master neglect the inrolment within the year, the apprentice may be discharged from his service. Vide Priv. Lond. 107. 303. Pal. 361. 2 Rol. 305.

So, by the custom of London, an apprentice may be assigned to another master of the same trade before his company, and afterwards before the chamberlain, and shall be bound to serve the second master for the whole residue of his term, and the first master shall be discharged. Vide Priv. Lond. 108. 304.

But if the apprentice be assigned before the company, and not before the chamberlain, the second master is not bound to maintain, nor the apprentice to serve him. Vide Priv. Lond. 304.

If there be a difference between a master and his apprentice, it may be determined by the chamberlain. Vide Priv. Lond. 303, 304.

Or, an action lies by the one or the other in the mayor's court, for breach of the indenture of apprenticeship. Vide Priv. Lond. 304.

If the master misuse the apprentice, or neglect to instruct him, or to find him necessaries, the chamberlain shall send a summons to the master to appear before him, and shall relieve the apprentice, or send him to his remedy in the mayor's court. Ibid.

If the master does not appear upon summons, the mayor or recorder shall send his warrant for him. Ibid.

So, if the apprentice be disorderly, &c. the chamberlain shall send the beadle for him, and afterwards shall send him to Bridewell, or otherwise punish him according to the nature of the offence. Vide Priv. Lond. 303.

So, for a reasonable cause the apprentice may be discharged from his apprenticeship. Vide Priv. Lond. 306.

And for that intent, the apprentice brings his indenture, or a copy, to an attorney in the mayor's court, who gives a note or warrant to the master, to inform him of the intent, and for what cause, and after four courts shall make a summons to the master to appear and shew cause to the contrary. Ibid.

If the master appears by attorney and traverses the cause, it shall be tried, and according to the verdict the apprentice shall be discharged or not, but without costs. Ibid. 307.

### (N 3.) As to disposition of their lands, &c.—By bargain and sale.

By the custom of London a citizen may make a bargain and sale by parol of his houses and lands in London, notwithstanding the st. 27 H. 8. 16.

For cities, &c. are there excepted. 2 Inst. 675. Vide Bargain and Sale, (B 4.)

So, a bargain and sale by husband and wife, of the wife's lands within London, binds the wife, being examined before the mayor. Vide Priv. Lond. 123. 148. Hob. 225. Cro. El. 869. Vide Baron and Feme, (G 4.)

(N 4.) By

(N 4.) By devise.

So, by the custom of London, a freeman may devise his lands, &c. in London. Vide Priv. Lond. 156.

By charter 1 Ed. 3. the king granted to the city of London liberty to devise lands in mortmain, as was used in time past; and therefore, they may devise in mortmain, without licence. 2 Inst. 21. Cro. Car. 248. 455. 517. 576.

So, by custom, a joint tenant may devise his purparty, and it will be a severance. Vide Priv. Lond. 156.

But a will of lands in London ought to be proved in the hustings, and there inrolled. Ibid.

So, it ought to be proved before the ordinary, and afterwards in the hustings. Cro. Car. 396, 7. Vide Devise (A.)

As to the custom of London in respect to orphans, and to the distribution of a freeman's personal estate, vide Guardian, (G 1, 2, &c.)

(N 5.) Erection of edifices.

By the custom of London, a man may rebuild his house or other edifice upon the antient foundation to what height he pleases, though thereby the antient windows or lights of an adjoining house are stopt, if there be no agreement in writing to the contrary. Vide Priv. Lond. 54. Vide Action upon the Case for a Nuisance, (C.)

[But if no other erection or building so as to stop his neighbour's lights. 1 B. M. 248.]

But he cannot stop antient lights by an erection upon a new soil, or beyond the antient foundation. Vide Priv. Lond. 56. Vide Action upon the Case for a Nuisance (A.)

So, for the repair of his house, a man by custom in London may set his poles and ladders upon the soil, or house of another adjoining. Vide Priv. Lond. 59.

But he cannot break the soil, or house. Ibid.

[Neither is the builder of an house in London, on a new foundation, entitled to erect half of his flank or side wall on his neighbour's vacant ground. 2 Bl. 959.]

[The stat. 11. G. 1. c. 28. is confined to party-walls between houses, and doth not extend to party-walls between stables. 4 B. M. 2298.]

[Stat. 14 G. 3. c. 78. directs the thickness of party-walls, prohibits bow-windows, except for shops on the ground story, to project only five inches, and the coping 13 inches, in streets 30 feet wide; and only 10 inches, and the coping 18 inches, in wider streets: and contains many other regulations for buildings in the bills of mortality; and in Mary-bone, Paddington, Pancras, and Chelsea.]

(N 6.) In regard to trade. — A citizen may trade where he pleases.

By charter H. 3. the king granted, that the citizens of London may traffic with their merchandize where they please, as well by sea as land. Vide Priv. Lond. 9. Vide Trade.

By the custom of London, a freeman having served in London, apprentice to a trade for seven years, that uses buying and selling, may leave that and use another trade of buying and selling. Cro. Car. 361. 517.

And such custom shall be good, notwithstanding the st. 5 El. 4. R. Cro. Car. 347. 516. Vide *Præscription*, (F 3.)

But a freeman of London cannot use a trade, contrary to the st. 5 El. 4. when he never served as an apprentice for seven years. R. 1 Sid. 427.

[It is a good custom to the portage of corn, roots, &c. belongs to the city from Staines Bridge to Yendal in Kent, and the bye-law is good, that none but the company of free porters shall carry it, on penalty of 20s. Str. 462.]

[It is a good custom, that persons to be admitted to freedom be obliged to swear on the New Testament. Str. 1112.]

[By st. 14. G. 3. c. 87. driver of cattle in the bills of mortality misbehaving, convicted before one justice, forfeits from 20s. to 5s. to prosecutor, or commitment to hard labour for a month, and whipping.]

[As to the customary duty on corn imported into London, see Douglass. 119.]

#### (N 7.) A wife may be a sole merchant.

So, by the custom of London, a *feme covert* may be a merchant, and trade in a different trade from her husband, and buy and sell by herself; in which case, if the wife be sued, the husband shall be joined only for conformity, and the wife alone shall be in execution. Cro. Car. 68, 69. Vide *Baron and Feme*, (A 2.)

[On this custom the *feme sole* merchant can bring an action only in the city courts; but if she and her husband be sued in a superior court, the husband may plead the custom in bar. 3 Bur. 1784. 4 T. R. 361.] (*h*)

[On this custom also a *feme sole* merchant is liable to a commission of bankrupt, and her assignees are entitled to her effects and debts due to her in the course of her trade. 3 Burr. 1784. 1 Bl. 570.]

#### (N 8.) A foreigner cannot buy or sell, within the city, to a foreigner.

By the custom of London, no stranger to the liberty of the city may buy or sell to any stranger to the liberties thereof, (save for the use of him and his family, and not to sell again), any merchandize or wares within the liberties of the city; and if they do, the goods shall be forfeited to the mayor and commonalty. Vide *Priv. London*, 104. Cro. El. 352.

(*h*) 1. A *feme covert* sole trader in the city of London is not liable to be sued as such in the courts at Westminster. 2. Bos. & Pull. 93.

2. And even in the city courts the husband should be joined for conformity. *Ibid.*

And this custom is explained and confirmed by charter 20 H. 7., and it is recited there, that it was confirmed by parliament. Vide Priv. Lond. 19. (i)

Right patent in London. Vide DROIT, (D.)

Tythes in London. Vide DISES, (M 6, 7.)

## LORD.

Lord of a feet. Vide LEET.

Lord of a manor. Vide COPYHOLD.—DISES, (C 4.)

Lords spiritual and temporal. Vide DIGNITY.—ECCLESIASTICAL PERSONS (C 1, 2.)—PARLIAMENT.—SCOTLAND, (D 4.)—SEREMENT, (C.)

Lord's day. Vide TEMPS, (B 3.)

## LUNATIC.

Vide CHANCERY, (3 Q.)—IDIOT.

## MAINPRIZE.

Vide BAIL (B).

## MAINTENANCE.

### (A) Maintenance ; what shall be.

(A 1.) By the common law. p. 22.

(A 2.) Champerty ; what shall be. p. 22.

(A 3.) What shall not be champerty. p. 22.

(A 4.) What shall be maintenance by statute, p. 23.

(A 5.) Buying a title, &c. p. 23.

### (B) What shall not be maintenance. p. 24.

### (C) Remedy for maintenance.

(C 1.) By the common law. p. 25.

(C 2.) By statute. p. 25.

(i) 1. An entry under the charter of the London *Baker's company*, to overlook bread, must either be by a majority of those to whom the power of entry is given, or those who enter must be appointed by the majority. 3 B. & P. 31.

2. *Wharfingers* in London are entitled to wharfage for goods unladed into lighters out of barges fastened to their wharfs. 3 Burr. 1409. 1 Blk. 413.

3. The right to compensation under the London *Dock Act*, passes with the tenement, to a devisee. 12 East, 477.



## (A) Maintenance ; what shall be.

## (A 1.) By the common law.

Maintenance is when a man maintains a suit or quarrel to the disturbance or hindrance of right. Co. L. 368. b. 2 Inst. 208. 212.

And it is general, or special. Co. L. 369. a.

And therefore, it will be maintenance in any one, who unlawfully sustains or supports a plaintiff or demandant, tenant or defendant, in a cause pending in suit, by word, writing, countenance, or deed. 2 Inst. 208.

As, if a master fee counsel out of his own money, or speak at the bar for his servant. R. Mo. 6.

So, if a servant retain an attorney to prosecute a suit for his master, without the consent of the master. D. 2 Rol. 77.

## (A 2.) Champerty ; what shall be.

If he who maintains another is to have by agreement part of the land, or debt, &c. in suit, it is called Champerty. Co. L. 368. b. 2 Inst. 208. 563. Vide post, (A 5. — C 1, 2.)

Or, if he agrees to have a rent or other profit out of the land. Co. L. 368. b. 2 Inst. 209. 563.

Though the agreement be by parol, or by deed. 2 Inst. 209.

Though the agreement be with a disseisor, though he has no right in the land. 2 Inst. 563.

Champerty is the most odious species of maintenance. 2 Inst. 208.

And was an offence by the common law. Ibid.

And now by the st. W. 1. 25. *nul minister le roy maintaine per luy, ne per auter, les ples en la cour le roy, des terres, tenements, ou des auters choses, pur aver part de ceo, ou auter profit per covenant fait. Et que le fera, soit punie a le volent le roy.*

Nor, by the st. W. 1. 28. *clerke de justice, ne de vicont, ne mainteint parties quarels en la cour le roy.*

Nor, by the st. Art. super Chart. 28 Ed. 1. 11. a minister of the king, nor any other, &c.

And therefore, a minister of the king or any other, who maintains a plea, pending in the king's court upon an agreement to have part of the thing in suit, will be a champertor. 2 Inst. 563.

So, by the st. de Defin. Consp. 33 Ed. 1. st. 2. champerters be they who move pleas or suits, or cause them to be moved by their own procurement, or by others, and sue at their proper costs to have part of the land in variance, or part of the gains.

Champerty shall be punished in all actions personal, real, or mixt. 2 Inst. 563.

## (A 3.) What shall not be champerty.

But it will not be champerty, if A. contracts with B. for a manor, for which B. is afterwards impleaded, and *pendente lite* B. conveys it to A. 2 Inst. 484. 563. Vide post, (A 5.)

## (A 4.) What

## (A 4.) What shall be maintenance by statute.

By the st. W. 1. 28. *clerke de justice, ne de vicont, ne mainteint parties en quarels en la cour le roy, &c.*

So, by the st. de Defin. Consp. 33 Ed. 1. st. 2. who bind themselves by oath, covenant, &c. falsely to move or maintain pleas.

By the st. 1 Ed. 3. st. 2. 14. none of the king's council, house, or other great or small, by himself or other, by letter or otherwise, shall maintain quarrels in the country to the let of the common law.

So, by the st. 20 Ed. 3. 4. none about the king, queen, or prince, or other great or small, shall maintain quarrels, &c.

Nor, by the st. 1 R. 2. 4. any of the king's counsellors, officers, or servants, or other person within the realm.

So, by the st. 32 H. 8. 9. all former statutes against maintenance, champerty, &c. are confirmed.

And by the same statute, no person shall unlawfully maintain or procure maintenance in any of the king's courts, &c. in any of his dominions, which have authority to hold plea of land, &c. nor retain for maintenance of any suit, &c. on pain of 10*l*.

## (A 5.) Buying a title, &amp;c.

So, by st. 32 H. 8. 9. no person shall buy or sell, or by any means obtain any pretended rights or titles, &c. to any manors, lands, &c. unless he who sells, &c. his ancestor, or they by whom he claims, have been in possession thereof, or of the reversion or remainder, or taken the rents or profits, by the space of a year before the bargain, on pain to forfeit the value of the lands, &c. so bought or sold.

And therefore, if any one, who has a naked right to lands sells them, it will be within the statute: as, if a disseisee before entry sell his land, though he has a real right to it. Co. L. 369. a.

So, if a disseisor grant an estate to A. for life or years, remainder to B. for life, in tail, or in fee, B. cannot contract with the disseisee, that he shall enter, or recover, and then convey to him. Co. L. 369. b.

So, if a feoffment be by an husband to the use of himself for life, and afterwards to his wife for life, and afterwards to his heirs, and then the husband entfeoffs a stranger, and dies, and the wife before entry sells to B. though her entry was congeable. R. 1. Leo. 166. 1 And. 201. Mo. 266. Golds. 101.

So, if a man, who has no colour of right or title, sells it to another, it will be within the statute, though the conveyance by him be void. Co. L. 369. a.

As if A. has the right, and B. sells, as land which descended to him from D. his father. R. 2 Mod. 67.

So, if a man who has a right, obtains possession wrongfully, he can sell within a year without danger; as, if a disseisee disseise the heir of the disseisor. Co. L. 369. a.

But if a man recover in ejectment, and has an *habere facias possessionem*, but sells immediately, before he be possessed for a year, it will not be maintenance. R. Godb. 450.

So, he who purchases a pretended right to a term for years, will be within the statute, which says, any pretended right. Co. L. 369. a. 2 And. 57.

Or, a pretended right to a copyhold. Co. L. 369. b. 4 Co. 26.

So, if a lease for years be accepted from A. having a right, and not in possession though the lease be void. R. 1 Leo. 166.

So, the grantee, as well as the grantor of a pretended right, &c. if he knew it, will be within the st. 32 H. 8. and shall lose the value of the land. Co. L. 369. a. Vide the words of the statute.

But the jury must find, that the grantee of a pretended title knew of it. R. 1 Leo. 166, 7.

So, by W. 2. 13 Ed. 1. 49. chancellor, treasurer, justices, *ne nul de conseil le roy, ne clerke de la chancery, ne del eschequer, &c. ne puis recevoir esglise, advowson, terre, &c. per done, ne per achate, ne afermer, &c. tanque come le chose est en plee devant nous, &c. Et qui encounter cest chose face, soit punie a la volunt le roy, auxibien celui qui le purchaserà, come celui qui le fra.*

And therefore, justices, king's counsel, or the clerk of a court cannot purchase, or take by gift, land, &c. in a suit *pendente lite*, though the purchase be *bona fide*, and not by champerty. 2 Inst. 484.

So if a serjeant, counsel, or attorney take a feoffment of part of the land *pendente lite*, in lieu of their fees, it will be champerty. 2 Inst. 564.

But a purchase *bona fide* by a stranger *pendente lite*, is no maintenance. 2 Inst. 484. 564.

Or if a father enfcoff his son of the land *pendente lite*, for his assistance. 2 Inst. 564.

So, a purchase by a counsel after a recovery, or a gift for his fees, is not maintenance, if it was not upon an agreement *pendente lite*. Ibid.

So, a surrender or conveyance *pendente lite*, by a tenant for life, or in tail, to him in reversion or remainder, is not maintenance; for he is the next in estate. Ibid. (k)

Vide post (B).

## (B) What shall not be maintenance.

By the st. art. super chart. 11. *nest mye a entendre, que home ni poit aver counsaile des countours, et des sages gents per son donant, ne de ses procheine amies.* Vide ante, (A 5.)

And therefore, it is no maintenance, if a counsel takes fees for his advice and assistance. 2 Inst. 564.

So, if an attorney expends his own money for his client, to be repaid. Ibid.

(k) 1. Bill for discovery whether the plaintiffs were not employed by one defendant, a peer, as solicitors to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of parliament; and praying, that he might be declared duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law. 3 Ves. 494.

2. An equitable interest under a contract of purchase may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract, and such sub-contracts are not within the doctrine of champerty and maintenance. Swanst. 56.

So,

So, if the father pays fees for his son, or *vice versa*, without expectation of repayment. Ibid.

So, if a master pays fees to counsel for his servant out of wages due to the servant. Mo. 6.

So, if a lessor pays fees, or maintains the suit for his lessee in ejectment. 2 Rol. 181.

[So, if a landlord sues in the name of his tenant to try a right. Dougl. 407.]

[If a mortgagee, not a party in a suit, advances money to support the title, it is not maintenance. 3 P. W. 375. (1)]

So, if a man who has a lawful possession obtains conveyance, release, &c. from him who has the right, he will not be within the st. 32 H. 8. 9., whereby it is provided, that it shall be lawful for any, in lawful possession, to get by any means the pretended right or title which any person hath to the same lands, &c. Co. L. 369. b.

If he be possessed *in presenti*, or of a reversion, or remainder upon the estate of A. who has the lawful possession, though he never received the rents Co. L. 369. b.

So, if a man has a tortious possession, and takes a release or conveyance from him who has the right, it is not within the statute, for it does not prejudice any one; as, if a disseisor takes a release, &c. from the disseisee. Co. L. 369. a.

So, if a mortgagor redeems a mortgage, and takes a re assignment from the mortgagee, he may sell though he had not possession for a year. Ibid.

So, if a man who has the right recovers the estate, he may presently sell it. Ibid.

Or, if a man be remitted to his antient right. Ibid.

So, if tenant for life, or in tail, die without issue, and he in the remainder before entry leases to another. R. 2 Leo. 48.

So, a lease for years, to the intent to maintain an ejectment, is not within the statute; unless it be to a great man for countenance to the suit. Co. L. 369. R. Sav. 95.

Though the lease for years be not to his heir, who may maintain, but to a stranger. R. cont. Sal. 96.

## (C) Remedy for maintenance.

### (C 1.) By the common law.

By the common law, champerty and maintenance were inquirable before the justices in eyre. 2 Inst. 208.

So, by the common law; an action lay for champerty or maintenance. Ibid.

And that in the courts of antient demesne, and other inferior courts, as well as in the superior. 2 Inst. 208.

### (C 2.) By statute.

By the st. W. 1. 25. champerty shall be punished *a le volunt le roy*, viz. at the suit of the king before his justices. 2 Inst. 208, 209.

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(1) For maintenance is justifiable from the privity of the parties in estate, or their connection, as master and servant. 3 Ves. 503.

By the st. Art. super Chartas, 28 Ed. 1. 11. a person atainted of champettry, *soit forfait en encurr. devers le roy des biens, et des terres le par-nour, a la value de tant come sa part de son purchase pertiel emprise amountor.* Vide 2 Inst. 563.

By the st. of champerty, 33 Ed. 1. st. 3. he shall be imprisoned for three years, and make fine at the king's pleasure.

By the st. 1 R. 2. 4. the king's counsellors and great officers shall suffer the pain ordained by the king himself with advice of his lords; the lesser officers or servants of the king, in the exchequer or other courts, &c. shall lose their offices, be imprisoned and ransomed at the king's will; and all others of the realm shall suffer imprisonment and ransom.

And therefore, the party may have an action founded upon any of these statutes. 2 Inst. 208. 212. 563.

And by the st. art. super. chart. 11. may have a writ directed to the justices before whom the plea is depending. 2 Inst. 563.

So, an action lies by *qui tam*, &c. upon the st. 32. H. 8. 9. for the penalty of 10*l.* against him who maintains a suit.

So, by the st. 4 Ed. 3. 11. the justices of one bench or the other, or of assise, shall hear and determine, at the suit of the king or the party, of maintainors, champertors, &c. as well as justices in eyre: and if straitened in time may adjourn it into B. R.

So, an information lies upon the st. 32 H. 8. 9. for purchasing a pretended title. 1 Leo. 166.

But the information must say, that the sale was of pretended title. Semb. Cro. Car. 233.

Maintenance of infants. Vide CHANCERY, (3 R. 6.)

## MALICE.

Vide ACTION UPON THE CASE FOR A CONSPIRACY, (C 3.)—ACTION UPON THE CASE FOR DEFAMATION, (G 5.)—ACTION UPON THE CASE FOR MISFEASANCE, (A 6.)—JUSTICES, (M 5.) &c.—(S 6.)

## [ MALT (*m*). ]

## MAN, ISLE OF,

Vide NAVIGATION, (F 2.)

## MAN-

(*m*) 1. The average number of days necessary for working the grain intended for malt, between the steeping and drying, is computed by the excise at sixteen. 1 Price, 369.

2. Proof of malt not having required so long a space of time in working and passing through the floors, from the cistern to the kiln, as it had been entered as having taken for that purpose, will, in some cases, be considered *prima facie* evidence of fraud; and duties are recoverable for the amount of so much grain malted as would be commensurate with such excess of time, as if so much of the duty were in arrear. 1 Price, 369.

3. The restrictive proviso in the 12 Ann. c. 2. limiting the right of the crown to proceed for arrears of duties on malt, to a period of five years previous to the commencement of suit, is not now in effect, not having been re-enacted by any of the subsequent malt acts referring to that statute. 1 Price, 438.

## MANDAMUS.

(A) ~~When~~ it lies. p. 27.(B) ~~When~~ it does not lie. p. 34.(C) ~~The~~ form of a mandamus.

(C 1.) To whom directed. p. 39.

(C 2.) Must be to make election. p. 40.

(C 3.) Must shew the party ought to be admitted.  
p. 40.

(C 4.) How teste'd. p. 41.

(D) Return of a mandamus.

(D 1.) By whom it shall be made. p. 41.

(D 2.) How made. p. 42.

(D 3.) What shall be a good one. p. 42.

(D 4.) What not. — If it do not shew the corporation  
had authority to amove, &c. p. 45.

(D 5.) If it be not certain. p. 47.

(D 6.) Remedy for a false, or no return. p. 49.

(A) ~~When~~ it lies.

The court of B. R. has power to amend all extrajudicial errors, which tend to the breach of the peace, oppression of the subject, or other misgovernance. R. 11 Co. 98. a.

[*Mandamus* is a prerogative writ, introduced to prevent disorder from a failure of justice and defect of police; and therefore ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. 3 B. M. 1265. Vide 1 Bl. 352. 552. Cowp. 378.]

[It is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter, but not as a private remedy to the party, except on the statute of queen Anne. B. R. H. 99.] (a)

And

4. A conviction stating in the evidence that the witness, being an officer of excise, went and surveyed the malt-house of the defendant on a certain day, in his presence, which is not contradicted, is sufficient *prima facie* evidence that the defendant was then a maltster, or maker of malt, within 42 Geo. 3. c. 38. 3 Smith, 377. 7 East, 389.

5. No appeal lies to the sessions from a conviction by two justices, for an offence under 42 Geo. 3. c. 38. s. 30. 2 Smith, 643. 6 East, 514.

6. The statute 42 Geo. 3. c. 38, was not absolutely repealed, but only its operation suspended by stat. 46 Geo. 3. 10 East, 569.

(a) 1. But it is discretional in the court to grant or refuse it; and it is never granted without reasons are assigned. 1 T. R. 396. Id. 423. 2 T. R. 290. 2 T. R. 385.

2. There

And therefore, by writ of *mandamus*, may command right to be done: as, if an officer elected in a city, borough, or corporation be removed without cause, he may be restored by *mandamus*; as, a mayor. Ray. 431. (o)

An alderman. 2 Bul. 122. 1 Vent. 19.

A jurat of a corporation. R. 1 Lev. 148.

A common council man. R. 2 Rol. 456. l. 35. Sti. 32.

A recorder. R. 2 Rol. 456. l. 30. R. v. Wells, H. 7 G. 3. 4 B. M. 1999.

A town clerk. Poph. 176. Noy, 78. 1 Vent. 77. 82. 1 Sid. 14. Sti. 457. Vide post, (B.)

A livery-man. Ray. 446.

A burgess. 2 Cro. 506. 1 Sid. 14. 5 Mod. 257.

A bailiff, serjeant, &c. R. 3 Rol. 456. l. 20. 32.

So, it lies for admitting him, who has right, though he never had possession of the office; as, to admit a mayor, alderman, &c. 4 Mod. 368. Sti. 299.

To admit a town clerk, elected in reversion after the death of B. when B. dies. R. Poph. 176. Noy, 78.

An high-steward, recorder, &c. Sti. 355.

To admit him to a freedom, who has a right by service, birth, &c. R. 1 Sid. 107. 1. Lev. 91. Ray. 69.

Though he broke his covenant in the indenture of apprenticeship, by marriage, &c. R. 1 Lev. 91. Vide post, (D 4.)

So, a *mandamus* lies for any public officer, who has no other remedy to be restored: as, for a steward of a court-leet. Adm. 1 Sid. 40. 169. Ray. 12.

Or, of a court baron, if he has a patent for life. Per Hale, 2 Lev. 18. Vide post, (B.)

For an attorney of the marshal's court, or other court. R. 1 Sid. 94. 152. Ray. 56. 94. 1 Lev. 75.

Treasurer of the New River water. Semb. 1 Sid. 169. 1 Lev. 123.

Scavenger. 1 Vent. 143. Sti. 346.

Clerk of the peace. Sho. 282.

2. There must in all cases be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a *mandamus*. 3 East, 213.

3. The general rule is, that if there be another specific legal remedy, the court will refuse to interfere by *mandamus*. An indictment does not appear to be a remedy within the import of this rule, being a proceeding *in pariam*, and not restoring the right withheld. Semble, therefore, that a *mandamus* will lie to commissioners under an inclosure act, to compel obedience to an order of the sessions, made on an appeal against commissioners, notwithstanding indictment lies. 2 M. & S. 60.

4. It is no answer to an application for a *mandamus*, that the party has a remedy in equity. 3 T. R. 646.

(o) 1. It seems that whenever a party is improperly suspended, or removed from an office, whether its duties are public or private, if he has a certain term therein, and there are profits annexed to it, a *mandamus* lies to restore him, provided he has no other specific remedy. Hence, it lies for the office of clerk of the Bridge-house estates in London. 2 T. R. 177. Loft. 551.

2. There is a great difference between an application for a *mandamus* to admit and one to restore to an office. The former is granted to try the right, since without a *mandamus* there is no legal remedy. But where a party has been in possession, he may try his right by an action for the profits; and therefore a *mandamus* to restore will not be granted, unless facts are stated, whence the court may infer a title in the party. 3 T. Rep. 575.

So,

So, for a master of a college. Ray. 101.

Or, a fellow of a college, where no visitor is appointed. Dub. 1 Mod. 82. Ray. 31. Adm. Ray. 111. Cont. 3 Mod. 265. 1 Lev. 23. Adm. 5 Mod. 404. R. cont. Carth. 92. Vide post, (B.)

[To the chancellor, &c. of an university, to restore a person to degrees. Fort. 202. Str. 557. 2 Ld. Raym. 1334.]

[N. B. They did not set out that they had a visitor, or it would have put an end to the dispute in B. R.]

[To the keepers of the common seal of the university of Cambridge, to put it to the appointment of high steward. 3 B. M. 1647.]

[To admit a chaplain when there is no visitor, or when the visitor is the same person who ought to admit. Str. 797.]

A fellow of the college of physicians. R. 1 Sid. 29. cont. Carth. 92. Vide post, (B.).

An usher, or master of a grammar school. Ray. 12. cont. 1 Sid. 40. Dub. Sti. 457.

[To restore an under-schoolmaster of a school founded by the crown. Str. 58.]

A register in the ecclesiastical court. D. Mod. Ca. 18.

Or, a deputy register. R. F. g. 194.

[It lies for a register of a bishop's court, to have his deputy admitted, though not for the deputy himself. Str. 893.]

To churchwardens, to restore a sexton (*p*). R. Ray. 211. 1 Vent. 143. 153. R. 2 Lev. 18.

Or, to swear him. R. Mar. 101.

So, if an office be granted to A. *exercend. per se, vel deputat.*; if the deputy be refused, a *mandamus* by A. lies to restore his deputy. R. 1 Lev. 306. 7.

So, a *mandamus* lies to an inferior jurisdiction, or officer, to require that which by the duty of his office he ought to do: as to the mayor, &c. of a corporation to admit him, who has a right to a freedom, of office. Vide supra.

[To compel the warden of a college to affix the common seal of the college to an answer of the fellows, &c. in chancery, contrary to his own separate answer put in. Cowp. 377.]

[To the commissioners of the land-tax in A. to compel them to elect a clerk to them in the department for the rates and duties on windows, houses, and lights. 1 T. R. 146.]

[To a mayor to put the corporate seal to the certificate of the election of recorder. Rex v. York, T. 32 Geo. 3. 4 T. R. 699.]

[To compel a meeting of mayor, aldermen, &c. requisite to approve a candidate for a franchise. 1 B. M. 127.]

[To a mayor, &c. disapproving, without cause, a person who has a right to be approved and admitted. Ibid.]

[To a mayor to proceed to election, where there is a clause to hold over. Str. 555.]

(*p*) 1. Or parish clerk. Say. 159.

2. Though removed by the parson. 11. Mod. 221. Sed vide March, 101. pl. 174. Salk. 556. 11 Mod. 261.

3. *Mandamus* granted to the vicar of Great Gaddesden to restore a parish clerk appointed and removed by him. M. 28 G. 2.

4. A *mandamus* lies to swear in as well as elect an officer, though it is not known who in particular will be elected. Ld. R. 559.



[To elect a mayor after a colourable election of one. 4 B. M. 2008.]

[It may be granted to go on to election of a mayor, though there is one *de facto*. Str. 1003. 1157.]

[But the subsisting mayor *de facto* must always be made a party. 1 Bl. 445.]

[And not for a mayor only, but for other officers necessary constituent parts of the corporation, as bailiffs, coroners, chamberlains, &c. Str. 1180.] (g).

[By a liberal construction of stat. 11 G. c. 4. a *mandamus* may be granted to elect a mayor, though there has been no legal mayor for some years. B. R. H. 178.]

[Two *mandamus's* may be granted on the application of different parties for the same election. Ibid.]

[On judgment of ouster against a mayor, *mandamus* cannot be granted till the judgment is actually signed, and then the prosecutor has a right of priority of motion for it. 3 B. M. 1386.] (r)

[To swear in an ale taster. Str. 608.]

[To swear in director of a chartered company, as the Amicable Assurance. Str. 696.] (s)

[To an old officer, to deliver records, which concern justice, to the new one. R. 1 Sid. 31.]

[To restore to the office of yeoman of the wood-wharf, being an ancient office, and a freehold. Str. 852.]

[To the clerk of a company, to deliver up books, &c. to the company, he being removed. Str. 879. Vide 1 Bl. 50.]

[For the steward of a borough to attend with the books at next corporate assembly. Str. 948.]

[To the old overseer of the poor, to deliver the books of the poor's rates to the new overseer. 1 Wils. 305.]

[To the lord of a leet, to administer the usual oath to a port-reeve of a town elected. R. 2 Rol. 82. 85.]

[It lies on 11 G. c. 4. to the steward of a court-leet to hold a court-leet, and there to swear a jury to present all things proper, that they may present A., the person duly elected mayor. Andr. 279.]

[To enforce the attendance of tenants of a manor at the court-leet, to make a jury. Str. 1207.]

[To steward and homage of a manor, to hold a court, and present purchase deeds of burgage tenements; which, when presented, entitle purchasers to vote for members. The homage are ministerial in this

(g) So, to elect a mayor, if it appear that the person elected is not qualified to accept the office, not having taken the sacrament within the limited time. 1 East, 79.

(r) 1. A *mandamus* lies to a mayor, &c. to fill up vacancies in a corporation, notwithstanding a *quo warranto* information, disputing his title, is pending against him, unless, perhaps, where the party applying for the *mandamus* is the prosecutor therein. 6 T. R. 301.

2. A *mandamus* will be granted after an election which is colourable and clearly void. 4 Burr. 2009.

(s) 1. A *mandamus* will lie to restore a recorder. 4 Burr. 1999.

2. A motion for a *mandamus* to affix the corporate seal to the certificate of the election to the office of recorder, on an affidavit that he had the majority of legal votes at the election, is, — like one to swear in a corporator —, of course. 4 T. R. 699.

case ;

case; if the conveyances are fraudulent and not good in law, it may be returned. 1 Wils. 283.]

[To a lord, to hold a court-baron, and to the homage to present conveyances of burgage tenements, whether the conveyances appear to be legal or not. 1 Bl. 300.] (t)

[To a judge of a court of a town to give judgment on a verdict, though he had granted a new trial, which he could not do. Str. 113]

[It lies to oblige an officer to do his duty, though there is a penalty for his neglect. B. R. H. 261.]

[In doubtful questions, the court will not determine on motion; *mandamus* shall go, that may it come before them on the return. Ibid.]

To the spiritual court, to administer the oath to one elected churchwarden. R. Mar. 22. 166. R. 1 Vent. 115. 267. R. Ray. 439. 1 Lev. 75. R. Pal. 51. R. 2 Rol. 234. l. 15. Mod. Ca. 89. 2 Rol. 106, 107. Lut. 1010. R. Carth. 118. R. Jon. 439. Cro. Car. 551. B. R. H. 130.

To swear a sexton, parish clerk, &c. R. Mar. 101. R. 2 Rol. 234. l. 35. (u)

To make a probate of a testament. R. Ray. 235. Acc. 2 Rol. 107.

(t) 1. A *mandamus* may be granted to admit to a copyhold estate, the person who appears to have the legal estate, without regard to his equity. 2 Smith, 417. 6 East, 431.

2. It is not a rule, that a *mandamus* to the lord of a manor, on behalf of a copyhold tenant, will only be granted where a suit is depending. Any other case of reasonable necessity is sufficient. 4 M. & S. 162.

3. A *mandamus* to admit to a copyhold lies, though no fine has been paid, since none is due until admittance. 2 T. R. 484.

(u) 1. The office of parish clerk is a temporal office; and the clerk, though appointed by the minister, if unlawfully displaced, may have a *mandamus* to be reinstated. Cowp. 370. 5 Burr. 1878. Loft. 434.

2. A *mandamus* may be granted to the trustees of a meeting-house to admit a dissenting teacher duly elected. 5 Burr. 1265. 1 Blk. 300. 352.

3. *Mandamus* granted to compel the warden of Wadham College to affix the common seal of the college to an answer of the fellows, &c. in chancery, contrary to his own separate answer put in. Cowp. 377.

4. A *mandamus* lies to the keepers of the common seal of the university of Cambridge, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grant passed in senate. 5 Burr. 1645. 1 Blk. 547.

5. A *mandamus* to the archbishop and bishop to license to a lectureship, or shew cause, &c. lies, if it appear that the candidate has a right. 15 East, 420. 427. 15 East, 117.

6. A refusal by the archbishop must appear, before the court will entertain a motion for a *mandamus* to the bishop to license to a lectureship, which he has refused to do on the alleged ground of unfitness. 15 East, 419.

7. A *mandamus* lies to admit or restore to the ministry of an endowed dissenting meeting-house. 5 T. R. 575.

8. A *mandamus* is grantable where there is no other specific legal remedy. Therefore it may be had by a candidate for the office of clerk to the commissioners of the land-tax in their department, for the rates and duties on windows, houses, and lights, directing the commissioners to proceed to an election. 1 T. R. 146.

9. *Mandamus* to arbitrators under a canal act to appoint an umpire. 5 Smith, 388.

10. Though a *mandamus* to churchwardens, &c. to make a church rate will not be granted, that being a matter of ecclesiastical cognizance; yet it will be granted to compel them to assemble and determine whether a rate should be made. 4 M. & S. 250.

11. A *mandamus* will lie to register and certify a dissenting meeting-house. 4 Burr. 1991. 1 Blk. 606.

12. A *mandamus* for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied. 4 Burr. 2295. 1 Blk. 640.

Or,

Or, to grant administration to him to whom it belongs. 1 Sid. 281. 372. 1 Lev. 187. R. Sti. 7, 8.

[To grant administration generally, but not to what person. Str. 552.]

[To grant administration to the next of kin, notwithstanding a suit depending, if the consanguinity be not denied. 1 Bl. 640.]

[But *lis pendens*, if the consanguinity do not appear, it is a sufficient reason to discharge a rule for a *mandamus*. 1 Bl. 668.]

Or, to absolve an excommunicated person. 2 Rol. 107.

To grant probate to an executor. R. 1 Vent. 335. R. Carth. 457.

And it is not a good return, that he did not give caution, being an insolvent. R. Carth. 458. Ld. R. 361.

[To a dean and chapter, to admit a prebendary to his stall and voice. Str. 159.]

[Or, to elect. 1 T. R. 652.]

[To a bishop to admit a parson to a prebend in his church. Str. 1082. Andr. 20.]

[To justices to receive complaints against such persons, who refuse to pay the sums assessed upon them, and to proceed thereupon to levy. 6 T. R. 198.]

[So, if on an appeal against overseers' accounts the sessions disallow some of the items, and do not order the overseers to pay the balance to the successors, two justices out of session may enforce payment of the balance, and if they refuse to interfere, the court will grant a *mandamus* to compel them to hear the complaint. 4 T. R. 246.]

To a justice of peace, to admit a constable. Adm. Noy, 78. Dub. 1 Bul. 174.

[To allow constables extraordinary charges in providing carriages for king's forces. Str. 42.]

[For them to compel treasurer of the county to reimburse constables' extraordinary charges in providing carriages for the king's forces. Str. 93.]

[To appoint overseers of an extraparochial vill. Str. 512. Fort. 321. 1 T. R. 374.]

[To justices, to appoint overseers in a hamlet where there never were any, if there are poor belonging to it, chargeable on another hamlet, which cannot remove them for want of them. 1 Wils. 138.]

To sign poor's rates. Carth. 450.

[To a justice of the quorum, when there is only one to sign a poor's rate. B. R. H. 128.]

Though there be a former rate signed, which omits part of the parish as not chargeable; for it is not inconsistent to sign both, whereby the right of those omitted may be contested. 2 Mod. Ca. 335. Vide Carth. 450.

[To justices, to swear an overseer to his accounts; if they have a legal objection, they may return it. 1 Wils. 125. Vide Justices of Peace, (B 65.)]

To grant warrant to levy balance of old overseers accounts. Str. 992. (x)

To

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(x) To two justices to receive and proceed on a complaint against an overseer for refusing to pay over a balance found by the sessions to be in his hands. 4 T. R. 246.

[To make a warrant of distress on a poor's rate, though it appears that the reason of their refusal was, that they insisted on first summoning and hearing the parties; but they may return that, or what they please. 1 Wils. 133.]

[To justices to swear surveyors of the highways. 4 B. M. 2452.]

To make a rate upon another parish for relief. 2 Mod. Ca. 344.

[To make a rate to reimburse a surveyor of the highways. Str. 211.]

To take surety for the peace. R. F. g. 85.

[To take security, on articles of the peace exhibited in B. R. Str. 835.]

[To proceed to judgment on an information of a seizure. Str. 530.]

To take an appeal by a teacher in a conventicle, convicted upon the st. 22 Car. 2. 1. Sand. Obs. upon the st. 57.

To admit one to take the oath, &c. in order to be a teacher of a separate congregation. Mod. Ca. 310.

[To register and certify a dissenting meeting-house. 4 B. M. 1991.]

[To the trustees of an endowed dissenting meeting-house, to admit one elected to the use of the pulpit, as pastor. 3 B. M. 1265. 1 Bl. 300.] (y)

[But upon applications for a *mandamus* to be restored, the party applying must shew that he has complied with all the requisites to give him a *prima facie* title; because if properly admitted, he may bring an action for money had and received for the profits. 3 T. R. 578.]

To a visitor to take an appeal to him made by a fellow removed. Semb. cont. 5 Mod. 453. Vide post, (B).

So, it lies to the mayor of London, to enter up a judgment upon the statute for rebuilding London. R. Ray. 214. 1 Vent. 187.

To the president and council of Wales, to admit a deputy of the secretary, who had his office *exercend. per se vel deput.* R. 1 Vent. 110. 1 Lev. 306.

To the mayor of a borough to inrol a testament, which by custom ought to be inrolled. 2 Rol. 106.

Vide Dismes, (M 8).

To one who has turned out the curate of a chapel, endowed with land, who had been appointed, been weeks in possession, and had a licence to restore him; and this, though the right of appointment is litigated; this is the proper and most effectual method to try right to officiate in chapels, whether it depends on nomination or election. 2 B. M. 1043.]

A *mandamus* must be made out according to the rule for it, or it will be superseded. Str. 879.]

[On motion for *mandamus* to restore one to be in the court of assist-

If a statute gives an appeal to the sessions, and requires the sessions to hear and determine an appeal within a limited time, and an application is made to the sessions to receive an appeal, and respite its hearing until after the time limited by the act for hearing and determining it, which they refuse, the court will not grant a *mandamus* to the justice to receive the appeal. 4. T. R. 488.

(y) 1. And though it lies to restore a pastor who has been removed. 5 T. R. 575. *supra*.

2. Yet a *mandamus* to restore a pastor shall not be granted, unless it appears that he has gone through all the ceremonies required by his sect to warrant him in holding the office. R. 3 T. R. 575.

3. And complied with the requisites of the toleration act. 3 T. R. 577.

ants of a company, there is no need of affidavit to shew he was once in; for if he was not, they may return that. B. R. H. 129.]

[If the court has proposed to try an election by issue, or to proceed to new election, and one party refuses it, the court will insert such refusal in the rule, that it may appear authentically to the jury on trial. 3 B. M. 1265.]

[By stat. 12 G. 3. c. 21. any person entitled to be admitted a freeman, who shall apply to the mayor, &c. to be admitted, and give notice, specifying the nature of his claim, and that unless admitted, in a month he will apply to B. R. for a *mandamus*, and *mandamus* afterwards is granted; and the person is admitted, the mayor, &c. shall pay costs.] (z)

### (B) When it does not lie. (a)

But a *mandamus* does not lie for a private office; as, to restore the steward of a court baron. 1 Sid. 40. 169. cont. if he has a patent for life. Per Hale, 2 Lev. 18. Acc. F. g. 194. Vide ante, (A). (b)

Or, a proctor in a spiritual court. R. 3 Lev. 309. 3. Mod. 332. Sho. 217. 251. 261. Skin. 290.—R. for they have jurisdiction over the officers of their courts. Carth. 169, 170.

Or, for the master of the water-house of the lord mayor: for it is more a service than an office. 1 Vent. 143.

Or, for a clerk of a private company in London. Mod. Ca. 18. (c)

Or, a town clerk, who was removable *ad libitum*. 1 Sid. 15. Vide 1 Vent. 77. 82. Vide ante, (A).

So, it does not lie for the admittance of any in an inn of court to the bar. Sti. 457. Ray. 69. Mar. 177. [Doug. 353.]

(z) 1. A second *mandamus* is not to be granted after a good return to a former one, on the ground that the former one was improperly directed. Ld. R. 563.

2. Upon a contested election for a corporate office, if one of the candidates gets a majority of votes *de facto*, is admitted and sworn in, the court will not grant a *mandamus* to admit and swear in the other upon affidavits that he had the majority of legal votes. 2 T. R. 259.

3. But had the election of the former been colourable only, and clearly void, they would grant a *mandamus* for the admission of the other. D. 2 T. R. 260.

(a) 1. To the lord of the manor to hold a court, summon a jury to present the conveyances and admit the parties burgesses; and another to the jury to present the conveyances.

2. To the lord of a manor to put particular persons, being burgage-holders of the manor, on his list to enable them to be sworn on the homage, in order to join with the other burgage-holders in the choice of a bailiff.

3. To the judge of an inferior court to give some judgment. But not what.

(b) 1. A *mandamus* will be granted to enforce a legal only, not an equitable right, as a trust, since over the latter a court of law has no jurisdiction. 3 T. R. 646.

2. And it will not be granted where there is another specific remedy; as by information in nature of *quo warranto*. Not, therefore, where one of two candidates for a corporate office having been elected and inducted, the other complains that himself ought to have been elected. 2 T. R. 259.

3. It is a general rule that a *mandamus* will not be granted, where the party applying for it has some other specific legal remedy; nor where the party may maintain *quare impedit*. Exceptions, however, to this rule have been allowed, where though the party has had another remedy, yet it has now become an absolute proceeding; thus where it has been an assize. 1 T. R. 396.

3. *Mandamus* will not be granted to do that which is likely to be done without it by consent. Lofft. 148.

(c) Nor to a rector to certify to the bishop the election of a lecturer, there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor's rates. 4 T. R. 125.

2. Nor where it appeared that the lectureship had been originally endowed by the rector with an annual stipend payable out of the impropriate rectory. 2 East, 462.

Or, to admit in the college of physicians. R. 2 Sho. 178. Carth. 92. R. 1 Lev. 19. Vide ante, (A).

[A *mandamus* to help a general visitor to visit his college, or to compel an inferior officer to do his duty is *felo de se*, and shall be quashed. B. R. H. 212.]

[There is no precedent of a *mandamus* to a visitor. Andr. 176.]

[And the court will certainly not grant it, when it is doubtful whether such person is visitor or not. 1 Wils. 266.]

[It does not lie to a bishop to grant a licence to a parson to preach as lecturer of a parish to which he has been elected by a number of the inhabitants where there is no temporal right in question, and where another elected by other of the inhabitants, and admitted by the rector, is in possession. 1 Wils. 11. Str. 1192.] (d).

[Nor to the bishop of a diocese, who is visitor, to restore a prebendary deprived by him for incontinency, though he had not admonished him thrice as the statutes require. 1 Wils. 206.]

[If parson has power to nominate parish-clerk, who must be approved of by the vestry; parson nominates A., many of the vestry sign their approbation, none dissent expressly, but some demand a poll for B., which is refused, the court will not grant *mandamus* to a parson to nominate. 3 B. M. 1877.]

So, it does not lie for a fellow of a college, when there is a visitor. R. Sho. 74. R. 3 Mod. 265. R. 1 Sid. 71. R. 1 Mod. 82. 2 Lev. 15. R. 1. Lev. 23. Carth. 168. R. Ray. 31. Adm. Ray. 102. 1 Mod. 84. 2 Jon. 175. Vide ante, (A). (e)

Or, for any fellow or scholar of a college; for if it has no special visitor, the founder shall be visitor. R. Carth. 92. (f')

(d) Nor to a bishop to license a lecturer without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shewn. 1 T. R. 331.

(e) 1. The court seemed to think a *mandamus* would not lie to restore a man to his stall as one of the vicars choral in a church (the church of Southwell in Nottinghamshire), because there was a visitor.

2. The court will not grant a *mandamus* for declaring one of the fellowships of a college vacant and proceeding to the election of a new one, because every college must have a visitor. 4 T. R. 235.

3. A *mandamus* does not lie to admit a vestry clerk, because it is not a fixed permanent office, but may be determined at any time by the inhabitants. 5 T. R. 713.

4. On a rule *nisi* for such a *mandamus*, it appeared that there had been a vestry clerk in the parish for many years, that he was chosen by the majority of the inhabitants, that the parishioners had agreed that the office should be held as an annual office, and that the clerk had always received an annual salary; but the court held that the parish were not bound to continue the office, and as it was of a private nature only and not permanent, the *mandamus* could not be granted, and accordingly they discharged the rule. 5 T. R. 713.

5. The court will not grant a *mandamus* to compel a man to obey an order of sessions; the proper remedy is by indictment. 6 T. R. 168.

6. Therefore they refused one to the treasurer of part of a county to compel him to pay the keeper of the common gaol a quarter's allowance granted him by the quarter sessions. 6 T. R. 168.

(f) 1. To a bishop to permit a person elected canon residentiary of a church to subscribe the liturgy, according to the acts of uniformity, to qualify him for admission.

2. To a bishop to grant a licence to preach in a particular church, to a person entitled so to preach there.

3. But it will not lie to make a bishop grant a licence to preach in a particular place, unless the person who applies for it.

4. Therefore a *mandamus* was refused to grant a licence to a man to preach in a church in which he was appointed lecturer, because his appointment was in direct opposition to the established usage (what seemed the material ground), because he had not leave from the rector.

[In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king, to be exercised by the great seal. On this ground the king, is visitor of St. Catherine's Hall, Cambridge, and the court refused to interfere by *mandamus* to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. 4 T. R. 233.]

Or, to the master of a college, to remove fellows for not taking the oaths. Semb. Skin. 393. 546.

So, it does not lie for an office not known, unless it be specially described; as to be one of the eight men in Ashbourn court, without describing what is his office. R. 2 Mod. 316.

[So, where there is a custom that no person shall be elected to, or serve an office for more than two years successively, a *mandamus* will not be granted to admit a person who has been elected to serve for a third or fourth year. 1 T. R. 423.]

[To give a man actual possession (except it be to restore) but only legal, and then he may maintain his right. Str. 536.]

So, a *mandamus* does not lie to prevent a molestation against law: as, not to molest a preacher. R. Sal. 572.

[Nor, to restore a person, where it is confessed he was rightly removed, though he had no notice at the time to appear and defend himself. Cowp. 523.]

[Nor, to restore to an office, though the party was irregularly suspended, if it appear by his own shewing, that there was good ground for the suspension, if the proceedings had been regular. 2 T. R. 177.] (g)

To make a rate to reimburse an overseer; for the statute does not direct any, but for relief of the poor. R. Sal. 53. 2 Mod. Ca. 338.

[To overseers, &c. to make an equal rate. 4 B. M. 2290. 1 Bl. 667.]  
[To churchwardens to make a church-rate, it being a subject of ecclesiastical jurisdiction. 5 T. R. 364.]

[To magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned. 6 T. R. 198.]

[To make a rate to reimburse two of the inhabitants their charges, in defence of an indictment for not repairing a bridge. Str. 63.] (h)

[Not to insert particular persons in a poor's rate, though affidavits of their sufficiency, and that they are omitted to prevent their voting for members of parliament. Str. 1259.] (i)

(g) 1. The court will not grant a *mandamus* in opposition to a long continued usage, where the words of a charter are in any degree doubtful, especially if there is another remedy open. 1 M. & S. 101.

2. A *mandamus* does not lie to the archbishop of Canterbury touching the admission of one as advocate in the court of arches. 8 East, 215.

(h) The court will grant a *mandamus* to justices to sign a poor's rate for a parish, notwithstanding affidavits that the parish contains several villis, and that each vill has immemorially maintained its own poor, and had separate rates for the purpose; that rates had been made for each vill in the current year, and the poor effectually provided for; because that would be to try the cause upon affidavits, and preclude the party from his remedy for a false return were the matter they contain false.

(i) A *mandamus* to compel a magistrate to enforce a conviction for the plaintiff refused, where he had returned that the defendant was convicted of the penalty beforehand, but that the said conviction was invalid in law; and there was not an offence for which the said penalty was payable, or could legally be levied. 2 Smith, 274.

[To

[To churchwardens. to call a vestry to elect churchwardens. Str. 686.] (k)

[To justices of a city to grant a licence to keep an alehouse. Str. 881.]

So, it does not lie to do an act, which the party may do, or not, at his discretion; as, it does not lie to a visitor to receive an appeal. Per Holt. M. 11 W. 3. Usher's Case, 5 Mod. 453.

[Contra, that it lies to hear an appeal and give some judgment. 2 T. R. 338. n.]

[Not to a mayor, to give the key of the town-hall to the lord of a manor to hold the court-leet in it, as had been usual. Wils. 76.]

To the ecclesiastical court to deliver an original will, proved there, to a devisee of lands by the same will. 1 Sid. 443.

To grant administration to one as next of kin, after an administration granted to another. Blackborow v. Davies, E. 13 W. 3. [Com. 96.] (l)

[To the ordinary, to grant administration *durante minori ætate*; for no law says to whom it shall be granted. Str. 892.]

[Or, to grant administration with the will annexed during minority to a certain person, nor to grant administration generally in such cases. And. 24.]

So, if there be a suit depending in the spiritual court, whether there was a will or not, a *mandamus* shall not be granted to grant administration, till the suit be determined. R. 5 Mod. 374, 5. 4 B. M. 2295.

Or, if such a *mandamus* is granted when there was a will, that may be returned. 5 Mod. 375.

So, a *mandamus* does not lie for a man outlawed, till the outlawry be reversed. R. Sho. 288.

[Or, to swear in one who has had judgment against him, on a *quo warranto* for usurpation. Str. 625.]

Or, to restore A. who was elected alderman, &c. in the place of B, afterwards restored by *mandamus*; though the place of B. be afterwards vacant; for A. must be elected *de novo*. R. 2 Bul. 122.

So, if he be not wrongfully ousted; as, if he resign. R. 1 Sid. 14.

Or, be only suspended. Dub. 1 Lev. 162.

Or, lapse his time; as, if a mayor be removed, after his year elapsed, he shall not have a *mandamus*. R. 1 Sid. 33.

So, if a peremptory *mandamus* go, there can be no *mandamus* for another, upon pretence that he was well elected, and the other *mandamus* gained by artifice, till the right of election be tried. R. 2 Jon. 215.

[Where an action will lie for a complete satisfaction equivalent to a specific relief, a *mandamus* will not lie. It will therefore not be granted against the bank to transfer stock, because a special action of *assumpsit* will lie. Doug 526.]

[Nor, against a bishop to license a curate of an augmented curacy, where there is a cross nomination, because the party has another specific legal remedy by *quare impedit*. 1 T. R. 396.]

(k) 1. The repairs of a church are a subject purely of ecclesiastical jurisdiction, hence, a *mandamus* for a rate for the repairs does not lie. 5 T. R. 364.

2. A *mandamus* to make a rate for the repairs of a church, e. gr. will be refused where the rate, as the defendants were required to make it, is bad. 12 East, 556.

(l) A *mandamus* for administration to the next of kin will not be granted, if a suit be depending concerning the validity of a will. 4. Burr. 2295. 1 Blk. 668.



[If the right of nomination be in one party, and that of presentation in another, if either impede the other in his right, a *quare impedit* lies, and therefore a *mandamus* will be refused. 3 T. R. 646.]

[A *mandamus* does not lie *ex debito justitiæ* for every rightful officer, though disseised, for he may bring assise. B. R. H. 99.]

[One who has a legal right to an office is not entitled to have books delivered by one who has an equitable right, and therefore not to a *mandamus* for them. B. R. H. 99.]

[The court will not grant cross or concurrent *mandamus* without special reasons. 2 B. M. 782.]

[If an election is doubtful, it should be tried by information *quo warranto*, not on *mandamus*. 3 B. M. 1452.]

[Therefore a *mandamus* was refused, to admit a recorder of a borough, because there was a recorder *de facto*; and the parties had another remedy by *quo warranto*; though both claimed under the same election. 2 T. R. 259.]

[And if a rule to shew cause is obtained, and it appears on affidavits that it was improper for *mandamus*, the court may discharge it with costs. Ibid. 1 T. R. 396.]

[The court will not grant a special *mandamus* to summon the individual persons who were summoned for a jury on a former day to proceed to election. 3 B. N. 1452. 1 Bl. 452.]

[The court will not grant a *mandamus* to compel the performance of any thing in future, which had been voluntarily done before: therefore, where trustees under a road act had turned a road through an inclosure, and made the fences at their own expence, and repaired them for several years; a *mandamus* was refused to compel them to continue such repairs, because there was no special provision in the act to that effect. 2 T. R. 232.]

[By an act of parliament for maintaining the poor at Southampton, and for other purposes, and incorporating the guardians, power is given to the guardians to raise money for certain purposes, and to appoint a treasurer who is to account to them and pay over, &c. according to their order; and an appeal is given to the quarter sessions against any thing done under the act, who have power to make such order therein, "either by directing the money to be returned, or otherwise, as to them shall seem meet;" the guardians ordered the treasurer to pay a sum of money for a purpose different from those mentioned in the act, against which an appeal was entered at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer. The court refused to grant a *mandamus* to compel the late treasurer to pay over the money according to the order of sessions, because he was a ministerial officer and bound to obey the order of the guardians. 5 T. R. 549.]

[The court will not grant a *mandamus* to restore a person banished from the university of Cambridge, under the statute *de concionibus*, though that statute inflicts also banishment from the college, which part of the punishment the sentence had not inflicted. 6 T. R. 89.]

[Nor, to admit a vestry clerk. 5 T. R. 713.]

[A., a captain of an India country trader, contracts in India with B. for a crew according to the custom of the country; A. arrives in England with the crew, and then makes a voyage with them to the West Indies

Indies and back again. An action was brought by part of the crew for wages due on the West India voyage, and it was holden, on a motion for a *mandamus* to examine witnesses in India under the statute 13 Geo. 3. c. 63. s. 44. that the cause of action did not arise there, and the rule was discharged with costs. (m) 1 Bos. & Pull. 177.] (n)

## (C) The form of a mandamus.

### (C 1.) To whom directed.

A *mandamus* must be directed to those, who are to do the thing commanded; and therefore, where a corporation is to elect, &c. it may be directed to them by their corporate name.

And if the corporation be misnamed, there shall be no restitution thereon. R. 2 Jon. 52. Vide Carth. 501. Sal. 700.

[The court, when they grant *mandamus*, will not specify the person to whom it shall be directed: it is at the peril of the person who desires the writ to direct it to a proper presiding officer. 2 B. M. 782.]

[It need not allege the person to whom it is directed is the person to whom it appertains, &c. and if it is not directed to the proper person, he must return it so. Str. 893.]

[After a return has been made, no objection can be received to the writ itself. 5 T. R. 66.]

[The rule to shew cause why a *mandamus* should not issue to chuse a

(m) 1. A *mandamus* will not lie to execute one part of a power granted by act of parliament. 2 Blk. 708.

2. A *mandamus* will not lie to the treasurer of a county to reimburse constables monies expended for conveying rogues, vagabonds, and disorderly persons. 2 Burr. 1197.

3. A *mandamus* does not lie to a ministerial officer to compel obedience to his duty; the remedy is by indictment; not, therefore, to the treasurer of a county to compel obedience to an order of quarter sessions. 6 T. R. 168.

4. A *mandamus* to examine witnesses in India pursuant to stat. does not lie where the suit is by an Indian mariner for wages in respect of a voyage undertaken, since his arrival here from this country to the West Indies. 1 B. & P. 177.

5. A *mandamus* does not lie to the Bank of England to transfer stock. Dougl. 524.

(n) Application for—1. In rules for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party. 3 Burr. 1452. 1 Blk. 445.

2. Affidavits for a *mandamus* sworn in court, or before a judge of K. B., need not be entitled in the K. B. 13 East, 189.

3. A *mandamus* to proceed to an election upon judgment of ouster, cannot be moved for till judgment be actually signed; and the prosecutor is entitled to the priority of this motion for a *mandamus*, in preference to every other person. 3 Burr. 1386.

4. A *mandamus* for a rate to reimburse those who have been compelled to pay a fine under an indictment against inhabitants for not repairing a road, must be applied for within a reasonable time after payment. 12 East, 366.

5. An application for a *mandamus* to compel a canal company to assess the value of and amount of compensation due for land taken for the purpose of the canal, must be made within a reasonable time. 1 M. & S. 32.

6. The motion for a *mandamus* to examine witnesses in an information for offences in India under st. 24 G. 3. c. 25. & 26 G. 3. c. 57. must be made within the four first full days after plea pleaded. 4 T. R. 662.

7. Where an application is made to the court for a *mandamus*, to direct the filling up any vacancies in a definite integral part of a corporation, the court will require strong grounds to induce them to refuse the writ, on account of the great inconvenience which may follow from the not filling up such vacancies, and the risk of dissolving the corporation. 6 T. R. 301.

8. When an application is made for a *mandamus*, and the question turns upon a custom which the parties litigating desire to have tried, the court will either grant the writ or direct an issue, according as the application is supported; and if unsupported, will discharge the rule. 1 T. R. 531.

mayor, should include the mayor *de facto*, and he should be served. 3 B. M. 1452.]

If the corporation be, mayor, aldermen, and commonalty, a writ to the mayor, burgesses and commonalty, is bad. Sal. 433.

So, if a writ be *ballivis*, &c. *gippi*, and not *gipwici*. Sal. 435.

[If the right of election is in the mayor and aldermen, and the *mandamus* is directed to the mayor, aldermen, and common council, the court will grant *supersedeas quia improvidè*. G. Str. 55.]

[If the power of amotion is in the mayor, aldermen, *et al. de communi concilio*, and the writ is directed to the mayor, aldermen and common council, it is well, though the word *al.* is omitted. G. Str. 640.]

If directed to those, who ought to do it, though they are only part of the corporation, it is sufficient. R. Sal. 699. 701. Carth. 501.

And if it be directed to them and more, it will be bad. Per three J. Holt cont. 701.

So, if a writ be to A., which commands B. to restore, &c. it shall be quashed. Sal. 436.

But it is sufficient, if it be directed to the corporation, though part only are to do that which is commanded by the writ. 1 Rol. 409.

If directed to the mayor and burgesses, *quod eligetis et juretis secundum auctoritatem vestram*, when the burgesses only are to elect, and the mayor only to swear. R. 2 Mod. Ca. 112. 128.

[In a *mandamus* to a company to compel them to inrol indentures of apprenticeship, it is sufficient to state generally, that those who have served a free burgess, &c. under indentures of apprenticeship, and whose indentures have been inrolled, are entitled to be admitted to their freedom; that A. B. had served, &c.; that his indentures ought to have been inrolled on being tendered, &c.; and that they were tendered for that purpose; but that the defendant refused to inrol them, &c. 7. T. R. 543.] (o)

### (C 2.) Must be to make election.

So, it ought to be granted, to proceed to an election to the office, and not to elect a particular person. R. 2 Bul. 122. R. 2 Rol. 456. l. 25.

[Under 11 G. 1. c. 4. it may be, to proceed to the election of any annual officer, as well as of the mayor, or head officer. 2 T. R. 732.]

If several are removed, it must be for each by himself; for several cannot join. R. 5 Mod. 11. Sal. 433. 436. 2 Mod. Ca. 209.

[It must not be to admit all persons having a right; if the writ is so drawn up it shall be superseded. Str. 578.]

[If there is a custom to give twenty-four hours notice of election, the court will not fix a day, nor order six days notice. Str. 949.]

### (C 3.) Must shew the party ought to be admitted. (p)

So, the writ of *mandamus* must suggest all that is requisite to shew the party ought to be admitted. Mod. Ca. 310.

[So,

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(o) A direction of a *mandamus* to a corporation, by its corporate name, notwithstanding the vacancy of the mayoralty, is good, since that is the legal description of the body as long as it continues to have any corporate existence at all. But where the direction is not to the corporation by its corporate name, it seems to be bad, if it extends beyond the persons who are required by the charter to concur in the particular thing commanded by the *mandamus*. 2 M. & S. 583.

(p) 1. Where an act is to be done by some of the integral parts of a corporation, it may be

[So, if the suggestion of the writ is, that he has a right (there set forth) to be admitted on payment of a reasonable fine, he need not shew how or by whom it is to be assessed. B. R. H. 362.]

A *mandamus* to overseers to account, must shew that there was no other remedy. 5 Mod. 420, 1.

But a *mandamus* to do, &c. is sufficient, though the words, *vel causam nobis significes*, &c. be omitted. R. 5 Mod. 314. Skin. 359. (r)

#### (C 4.) How teste'd.

So, a *mandamus* must be teste'd within term. 1 Sid. 304. Vide Abatement, (H. 14)

Must have fifteen days between the teste and return, if it goes above forty miles, otherwise only eight days. Sal. 434.

[Must have fourteen days between the teste and return if it goes above forty miles, otherwise only eight days, and one day is to be taken inclusive, the other exclusive. Str. 407.]

But a *mandamus* may be amended before the return. Mod. Ca. 133.

#### (D) Return of a mandamus.

##### (D 1.) By whom it shall be made.

The return of a *mandamus* shall be made by those to whom the writ is directed.

be directed either to the whole corporation, Ld. R. 560. Salk. 701. or those integral parts. Ld. R. 559.

2. In the latter case it may be directed to those integral parts by their corporate denomination. Ibid.

3. As to the mayor, bailiffs, and capital burgesses of a corporation, consisting of mayor, bailiffs, capital and common burgesses. Ld. R. 559.

4. But in a *mandamus* directed to some only of the integral parts of a corporation by their corporate names, care must be taken that it is directed to those only whose duty or privilege it is to interfere in the act:—if it is directed to any more, it will be bad. Salk. 701.

5. Thus a *mandamus* for the admission of a town clerk in a corporation, consisting of mayor, aldermen, and citizens, directed to the mayor and aldermen, was quashed, because the right or power of admission was in the mayor only. Salk. 701. Holt *dissentiente*.

(r) 1. A *mandamus* must state all facts necessary to shew that the prosecutor is entitled to the relief prayed. Those coroners of liberties or franchises alone are entitled to fees under st. 12 G. 3. c. 29. where the liberty is contributory to the county rates: in a *mandamus*, therefore, by such coroner, to compel an order for such fees, it must be stated that the liberty so contributes. 7 T. R. 48.

2. Where a rule has been obtained for a *mandamus* to issue, and the *mandamus* is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a *mandamus*, but materially enlarging the terms, the court will quash the *mandamus*, notwithstanding they might, upon the same affidavits, have granted one as large, had it been applied for. 2 Smith, 54.

3. In support of a motion for a *mandamus* to the sessions to admit, &c. a protestant dissenter as teacher or preacher, it must be shewn that he has some distinct congregation attached to him as such. 14 East, 285.

4. A *mandamus* to a bishop to grant a licence to a curate upon the nomination of the inhabitants of a parish must state that there is an immemorial usage for the inhabitants to elect, or an immemorial endowment. 3 Smith, 341. 6 East, 345.

5. A *mandamus* to admit and swear in an officer should shew that the person or persons to whom it is directed have the right of admitting and swearing in. Str. 893.

6. But no objection can be taken to the omission after a return, insisting upon a want of title in the person to be admitted. Str. 893.

If the writ be directed to the bailiffs, &c. of a corporation to swear others elected bailiffs, it shall be returned by the old bailiffs, though others have been sworn to the same office; for if the old swear others not duly elected, they continue bailiffs. Mod. Ca. 133.

But, if the return be by the mayor and burgesses to whom directed, it shall not be refused upon a suggestion that the major part did not consent. Sal. 431. Carth. 500.

Or, that the mayor made the return without assent of the corporation. Sal. 432.

### (D 2.) How made.

A return to a *mandamus* may be received without oath of the truth. R. 1 Sid. 257.

Need not be under the common seal. 1 Sal. 192.

Or, signed by the head of the corporation. 1 Sal. 192. Skin. 368.

So, the court will not direct how it shall be made.

Nor, give a rule for a view of the charter; though they shall have it in an action for a false return. Sal. 430.

By the st. 9 Ann. 20. a return to a *mandamus* for admitting or restoring to any office or freedom in a corporation, shall be made to the first writ.

So, the court may require that the return be made upon oath. Per Dod. Pal. 455. Dict. Ray. 365.

Or, at a day certain. F. g. 4.

[If the return is made, and signed by the mayor, and delivered to prosecutor's agent, and the mayor dies, the return may be filed afterwards. 3 B. M. 1641.]

### (D 3.) What shall be a good one.

The return to a *mandamus* for restoration to an office may be, that he was never elected. Vide post, (D 4.) (s)

(\*) 1. An erroneous judgment is conclusive, until regularly reversed by error; and is, therefore, sufficient to support a return to a *mandamus*. 7 T. R. 467.

2. The return to a *mandamus* being traversable, is regulated by the rules of pleading. 2 T. R. 456.

3. Semble, that since an erroneous judgment cannot be impugned in a collateral proceeding, such judgment will support a return to a *mandamus*; therefore the return need not detail the circumstances necessary to support the judgment. 1 East, 306.

4. Presumption and intendment ought to be in favour of returns to *mandamus*es. Dougl. 159.

5. Though the return to a *mandamus* is defective in parts, yet, if on the whole it appears that the party was justified in what he did, it is sufficient. 6 T. R. 490.

6. "Not duly elected," is a good return to a *mandamus* to admit. Dougl. 80.

7. Return to a *mandamus* that A. was not duly elected sexton, according to an ancient custom; that there is a custom for the inhabitants, &c. to remove at pleasure, and that A. was removed pursuant to such custom, is good. Cowp. 413.

8. A return to a *mandamus* to admit to shew cause to the contrary, may shew one, or more, or any number of causes, provided they be consistent. 4 Burr. 2041.

9. The return of removal to a *mandamus* to restore, must set forth the due execution of the power of removal. Hence, if the person be within summons, i. e. if he be resident, since he must be summoned to attend, and shew cause against his disfranchisement, that he was so summoned must appear upon the return, unless it appear that he was actually heard. 8 T. R. 209.

[That

[That he was not elected churchwarden. Ld. Raym. 1495.] (r)

That he was removable *ad libitum*, without other cause, when this is warranted by custom or charter. R. Ray. 188. 1 Sid. 461. 1 Vent. 77.

[And this without shewing summons, or that the office is filled up. Str. 115.]

[On a *mandamus* to churchwardens to restore L. C. to the office of sexton, a return that L. C. was not duly elected according to ancient custom; and that there is a custom for the churchwardens and inhabitants to remove at pleasure, and that L. C. was removed pursuant to such custom, is good. Cowp. 413.]

[That he was guilty of bribery, and therefore they removed him, having power to remove. Fort. 200.]

[That he is an officer at pleasure, and on summons to chuse another, they chose another, and thereby A. was amoved, good; for a new election is an actual amotion. Str. 674.]

So, if the writ be to restore A. *debito modo elect.*, the return may say in the words of the writ, *quod non fuit debito modo elect.* Sal. 434.

[Not duly elected, admitted, and sworn, is not a good return to a *mandamus* to restore. Doug. 79,]

[If the writ be to admit, it is a good return that he was not duly elected. Ibid.]

If a writ be to admit two churchwardens *debito modo elect.*, it may say, *non fuerunt debito modo elect.*; for both must be so, otherwise the writ is insufficient: Sal. 433, 4.

The return must shew the power (vide 2 Str. 819.) to amove, that there was such cause for removal, that he was summoned, and upon appearance could not excuse himself; wherefore he was amoved, according to the power.

Or, that he was summoned, and did not appear.

Or, that he appeared; for then a summons is not material. Sal. 428. (u)

If the return says, *quod procuraverunt cum summoniri*, it is sufficient. R. 1 Vent. 19.

That he was summoned, though it does not shew for what cause, specially. Semb. 5 Mod. 259.

(t) 1. To a *mandamus* to restore an officer, a return generally that he resigned, is good, for it shall be intended to mean, that the resignation was legal and complete. R. Ld. R. 565.

2. Though the resignation must have been by deed, the return need not shew the deed. R. Ld. R. 565.

3. A return may contain any number of causes for not complying with the direction of the writ. 2 T. R. 456.

4. But such causes must be consistent with one another, otherwise the whole return must be quashed. 2 T. R. 459. 461.

5. Where all the causes are consistent, though some of them be bad, the whole return shall not be quashed, but so much as relates to them only. 8 T. R. 456.

(u) 1. In the return it should appear that the body removing had proved the charge, for which the member was removed. 8 T. R. 352.

2. It is not sufficient to state that he was present when the charge was made, and did not deny it. Ibid.

3. Where a power of removal is not given to any particular part of a body, it rests with the company at large. Per Ld. Kenyon, C. J. Ibid.

*Quod*

*Quod fuit auditus de materiis objectis*, though it does not say that he was summoned; for the intent of the summons is, that he may be heard. Semb. 5 Mod. 259. Sal 428.

[In a return to a *mandamus* to restore, if it be stated that the party was amoved by the body at large, it is unnecessary to aver that the power is vested in them. If the party mean to contend that it is vested in a select part, he must allege it in reply to the return. Doug. 149.]

So, a return which says, *fuit amotus per majorem et burgenses* is sufficient, though the power be given to the mayor, and burgesses who had been mayors; for it shall be intended, that all the burgesses were present and assented: and if there was not the assent of the major part of those who had been mayors, an action lies for a false return. R. 1 Vent. 20.

So, if it says, another was elected mayor before the writ to him, and *adhuc est major*, without saying, *debito modo electus*. Dub. Ray. 365.

So, if the return be, *quod fuit amotus* 21 Aug., and in another part, that he continued in office till 25th December, which is contradictory: yet the return will be good, for it is surplusage. 1 Vent. 144.

*Quod fuit debito modo amotus*. 5 Mod. 11.

It is not necessary that the removal should be under the common seal; for, being *per majorem et aldermannos*, it shall be intended. R. 1 Vent. 77. 82. 342.

[If commissioners of sewers, on a *mandamus* to make a rate, return, that the commission expired four days after the writ was delivered, and so they had not time, it is good. Str. 763. Ld. Raym. 1479.]

[To a *mandamus* to license usher of a school, bishop may return, he is inquiring into the truth of an accusation on a *caveat*. Str. 1023.]

[To a *mandamus* to restore A. who was duly elected, sworn, and admitted, (mentioning no time) that A. was on 29th August duly elected, but that neither at his election, nor since, nor yet, is he sworn or admitted, and therefore, &c. is a good return. Andr. 105.]

[To a *mandamus* to grant probate to executor, that before the writ, and now is pending a suit in the prerogative court touching the validity of the will, is a good return. Andr. 365. 4 B. M. 2295.]

[To a *mandamus* to grant administration to the husband of deceased, that husband had admitted in a suit, that by deed before marriage he had agreed she should make a will, which she had made, and suit was depending for the administration with the will annexed, is good; for the husband's consent appears. Str. 1111.]

[To *mandamus* reciting, that there are substantial inhabitants in A., therefore to appoint overseers; that A. is extra-parochial, and is not, nor is, nor ever was, reputed, a vill or township, is good, though it answers not the supposal as to substantial inhabitants. Str. 1143.]

[To *mandamus* to two justices, to proceed and give judgment in a complaint depending before them, that they have heard and determined the complaint, is good. Wils. 21.]

[On *mandamus* to justices to register and certify a dissenting meeting-house, they may return, "not within the qualifications." 4 B. M. 1991.]

[The return is good, if it pursues the suggestion of the writ, as if it is suggested that A. was chosen in Easter week, and the return is, that he was not chosen in Easter week. Str. 1235.]

[That

[That A. was not a burgess; that he was not eligible to the office of common council man; and that he was not elected, are not inconsistent returns. 2 T. R. 456.]

[It is a good return to a *mandamus* to the ordinary to grant a licence to teach in a grammar school, to state that he had suspended granting his licence until the party would submit himself to be examined "touching his sufficiency in learning." 6 T. R. 490.]

[The court will not quash a return to a *mandamus*, (which directed an inferior court to give judgment on an indictment) merely because it states an erroneous judgment given below; but a writ of error must be brought, to reverse that judgment. 7 T. R. 467.]

(D 4.) What not (x). — If it do not shew the corporation had authority to amove, &c.

But a return is not good, if it does not shew, that the corporation has authority to remove, and how. Vide 2 Str. 819. (y)

So, a return upon a *mandamus*, directed to A., mayor, that before the writ awarded he was removed, and B. elected, and now is mayor; for by a collusive resignation of his office, the return may be evaded. R. Ray. 431. Dub. Ray. 365. R. 2 Jon. 177. (z)

If

(x) 1. To a *mandamus* to admit an officer, and swear him in, a return that the office is full, is bad, for the admission confers no title, but only gives the party admitted the power of insisting upon the right he claims, and the persons to whom the *mandamus* is directed are not to deprive him of that power.

2. So a return to a *mandamus* to swear in a churchwarden, that another is sworn in, is bad.

3. A return must have the utmost possible certainty. Ld. R. 559.

4. Thus where the mayor of a corporation was eligible out of two capital burgesses nominated by a part of the corporation, and a *mandamus* issued to enforce such election, a return stating an election of the two nominees to the offices of capital burgesses, and shewing that return to have been void, was held bad, because it did not expressly negative a subsequent election. R. Ibid.

5. And an obligation "and that they were not capital burgesses," was considered as a conclusion only from the former statement, and held not to make it good. Ld. R. 559.

(y) 1. A return to a *mandamus*, which is a negative pregnant, is bad; as where the writ having stated that the corporation being duly assembled, proceeded to the election of a recorder, the return is, that they were not duly assembled to proceed to the election of a recorder; thereby implying that they were assembled for some other purpose. 5 T. R. 66.

2. On a *mandamus* to restore to the office of a capital burgess in a return, that the cause of amotion was non-attendance at a meeting to which the party was summoned for the election of a capital burgess, an averment that the right of election is, in the capital burgesses, being the common council, does not assert with sufficient certainty that he had a right to concur in the election, because it does not necessarily appear that all the capital burgesses are of the common council. Dougl. 177.

3. A return to a *mandamus* to restore an alderman disallowed, because it did not set forth a total desertion from the place of which the party was alderman. 4 Burr. 2087.

4. A return to a *mandamus* to certify the election of a recorder, stated to have been made on a given day, that the corporation were not duly assembled on that day to proceed to the election of a recorder, imports that they were not convened at all that day, and is therefore inconsistent with a return which states an election upon that day of some other corporate officer, though the days are laid under *videlicet*, unless it be shewn that the meeting was sufficiently constituted for the election of the latter, though not of the former. 5 T. R. 66.

(z) 1. To a *mandamus* for the election of a corporate officer, the return must either expressly deny the right of election mentioned in the writ. Ld. R. 480.

2. Or



If it does not shew, that the party was summoned, or heard to the matters objected against him. 11 Co. 99. a. Sti. 151. 447. 8 T. R. 209. Vide ante, (D 3.)

[If it does not set forth that the party deprived was summoned. Fort. 202. Str. 537. 2 Ld. Raym. 1334.]

[N. B. They did not set out that they had proceeded according to the civil law, which they might have done, by which they can proceed in the absence of the party accused.]

[It is not sufficient to say, the common council was in due manner met and assembled; it must expressly allege that they were all summoned. 2 B. M. 723.]

And, *licet sæpius requisitus*, is not sufficient. 5 Mod. 258. R. 4 Mod. 37.

If it does not answer to the supposal of the writ; and therefore, if the writ supposes, that they ought to elect persons not in office three years before, it is not sufficient to say, that by the charter they ought to elect out of aldermen, and they have elected out of the aldermen. Sal. 431.

If the writ supposes them capital burgesses, and the return says, that they did not take the sacrament before election; for they might have been elected at another time. Sal. 432.

If a return to a *mandamus*, for swearing churchwardens elected by the parishioners, according to the custom, says *quod lis pendet* in the ecclesiastical court concerning the custom *indeciſe*; for the ecclesiastical court cannot try the custom. R. Ray. 440. F. g. 195.

[If to a *mandamus* to swear in a churchwarden, it is returned that the bishop of A. did inhibit the archdeacon, whose official defendant is to proceed, it is bad, if it do not aver that the parish is in the diocese of A., for the court cannot take notice of it. 2 Ld. Raym. 1379. Str. 609.]

Or, if the return be, *quod non fuit electus*, generally. 2 Mod. Ca. 380. 325. Semb. cont. F. g. 195. Vide ante, (D 3.)

[If to a *mandamus* to swear in a churchwarden, the archdeacon return, *non fuit electus*, it is bad. 2 Ld. Raym. 1379. Sed per Ld. Raym. This is certainly wrong, and so ruled to be a good return in *Rex v. Harwood*. 2 Ld. Raym. 1405.]

So, it cannot be returned, that the borough is within a county palatine. Sid. 92.

That an apprentice married contrary to his indenture; for that is only a breach of covenant. R. Ray. 92. 1 Lev. 91. Vide ante, (A.)

[To a *mandamus* to admit the master of Catherine Hall to a prebend, under letters patent, returned, that by their statutes no person who is prebendary of another church can be admitted, that the said master is prebend of Saint Paul, and therefore they cannot admit, not allowed, because said letters patent had been confirmed by act of parliament, and peremptory *mandamus* granted. Str. 159. Fort. 222.

[That the party had misbehaved as chamberlain, and therefore they had removed him from being a capital burgess, is bad, Ld. Raym. 1564.]

2. Or shew an election under it. R. Ld. R. 480.

3. A return merely stating a different right, and shewing an election under it, is bad. Ld. R. 480.

4. An inhibition from a court not to do any thing to the prejudice of a deputy at will, is no answer to a *mandamus* to admit another deputy, if the inhibition is in a cause instituted to deprive the deputy at the suit of any other person than the principal. Str. 893.

[On a *mandamus*, on the complaint of the register for life of a bishop's court, to admit a deputy, if the commissary return, that a former deputy had been removed, and had appealed, and that delegates had issued inhibition to do nothing to the prejudice of appellant pending the appeal, which was not yet determined, and therefore he could not admit, &c. it is bad; for he is but ministerial, and must execute his part. Str. 893.]

[That cross suits are depending before him, and that he cannot admit till he shall have judicially determined who was elected, is bad on cross *mandamus*'s; to admit A. and to admit B. he must obey both *mandamus*'s, and admit both A. and B. 3 B. M. 1420.]

[If the return admits the party's qualification, that there are five court days at which persons should be admitted, that he had notice and did not appear, and therefore cannot be admitted, it is bad, unless it sets forth, that he is tied up to these five days. Andr. 1.]

[To *mandamus* to grant administration to husband of deceased, that her mother had given her effects to her separate use, that she had made her will which was litigating, is bad; for here no assent of husband's appears as to these effects, and she may have others. Str. 1118.]

[To *mandamus* to admit a man who is a quaker, member of the Turkey company, it is not good to say he would not take the oath prescribed by 26 G. 2. c. 18. his affirmation is sufficient, 2 B. M. 999.]

[That an alderman had totally left the borough (when he had only left it four months, and no notice given him). 4 B. M. 2087.]

### (D 5.) If it be not certain.

So, the return to a *mandamus* shall be disallowed, if it be not certain and positive; for no answer can be given to it. 11 Co. 99. b. (a)

And therefore if it says, *non fuit debito modo electus*, it is bad; for that is a negative pregnant. Dub. Ray. 365. R. 1 Sid. 209, 210. Semb. cont. Sho. 253. R. cont. Carth. 170. 5 T. R. 66. (b)

So, if it says, *non fuit amotus per nos*. Semb. but held cont. 1 Sid. 210.

*Non constat quod fuit electus*. R. 1 Vent. 267. Ray. 153.

(a) Where by the charter the transaction of certain business is limited to one particular day, a return to a *mandamus*, assigning as a reason for not completing it, that the day was consumed in the necessary business of the corporation, is bad; since it ought to be shewn what the business was, and how necessary, that the court may adjudge on the sufficiency of the excuse. 1 M. & S. 697.

(b) 1. A clerical mistake in a return to a *mandamus* may be amended after the return has been filed. Dougl. 135.

2. But the return cannot be amended after it has been traversed. 4 T. R. 689.

3. The return to a *mandamus* may be quashed as to part, and allowed as to part, provided the two are independent of, and not inconsistent with each other, since if they are, the whole must be quashed, for then the court cannot know which to believe. 2 T. R. 456.

4. If several returns to a *mandamus* are inconsistent, the whole will be quashed. 5 T. R. 66.

5. The prosecutor may reply to a return to a *mandamus*. Dougl. 159.

6. "Not duly elected, admitted and sworn," is not a good return to a *mandamus* to restore. Dougl. 79.

*Tempore brevis non fuit constitutus.* R. 1 Vent. 111. 1 Lev. 306.

*Quod servivit ut journeyman potius quam servus.* R. Ray. 92.

*Quod ante advent. brevis fuit electus pro anno, et ad finem anni amotus,* without saying at what time. 5 Mod. 10.

That B. had so many votes, and the plaintiff only so many. R. Mod. Ca. 309.

So, that A. and B. were not elected, without saying *nec aliquis eorum*. R. Mod. Ca. 89.

Or, they ought to make a special return, that a custom was claimed to elect two, or that they had equal votes, or are jointly elected, &c. Per Holt, Mod. Ca. 89.

So, if it says, *quod procuraverunt A. eum summonere*; for that is not direct that he was summoned. 1 Vent. 19.

That he was heard *de aliis criminibus ei objectus*, without saying, what, before whom, or in what place. Semb. 5 Mod. 258.

That he was *auditus in communi concilio*, without saying, by whom, &c. 5 Mod. 258.

That he did not account for money to the corporation, without saying that he was request and refused. 5 Mod. 259.

That he did not take the oath required by the st. 13 Car. 2. before the mayor, without saying, or before justices of the peace, who by the same statute have also authority to administer it. R. 5 Mod. 318.

Or, that he did not take it before them; when before justices of peace, or two of them, is sufficient. R. Sal. 429.

So, if they return a custom to remove *ad libitum*, only by way of recital, without saying positively that there is such a custom. R. Sal. 430.

If they return, no sacrament taken before election, *per quod electio vacua et non sunt capitales burgenses*; for that is only an inference from the premises. R. Sal. 432.

So, if the return consist of several inconsistent matters; as, misbehaviour, bribery, and not elected. Sal. 436. 5 T. R. 66.

Yet, if it appears by the return, that he ought not to be restored, &c. it is sufficient, though the return be insufficient; as if it appears, that he resigned, though the return be not certain, he shall not have a peremptory *mandamus*. R. 1 Sid. 14. R. Sal. 433.

Yet, where a man was removable *ad libitum*, where the return was of a removal for a cause that was insufficient, he had a peremptory *mandamus*. R. Sal. 429. 435. (c)

So, a mere misprison in a return may be amended. Sho. 273.

[After verdict on a traverse to a return to a *mandamus* made by a corporation, the court will not allow the defendants to amend the return, by setting forth a different constitution. 7 T. R. 699.]

Vide Amendment, (G 1.)

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(c) A peremptory *mandamus* shall not be granted on account of a judgment for the plaintiff in an action for a false return; unless such action was brought in the court which granted the *mandamus*. Ld. R. 125.

## (D 6.) Remedy for a false, or no return.

If an officer make a false return to a *mandamus*, an action upon the case lies for the party grieved; and if he obtains a verdict, he shall have restitution. 11 Co. 99. b. (e)

[In an action for a false return, what is only a circumstance need not be proved; as, that plaintiff after he was elected presented himself to be sworn. Str. 728.]

[On action for false return, of *non fuit electus*, to a *mandamus*, to deliver the insignia, &c. to a town clerk, plaintiff need not prove taking the sacrament within the year before election, if the trial is above six months after the election without prosecution. 2 B. M. 1013.]

And a peremptory *mandamus* for his restitution is of right, when the return is falsified. Sal. 430.

So, by the st. 9 Ann. 20. on return to a *mandamus*, the person prosecuting it may plead, and traverse all or any material facts contained in the return; to which the persons making the return may reply, take issue, or demur; and such further proceedings shall be as if an action on the case had been brought for a false return.

And the issue joined shall be tried, where the issue in an action on the case might be tried.

And if a verdict be for the prosecutor, or a judgment on demurrer, by *nil dicit*, or for want of replication, or other pleading, he shall recover damages and costs, as he might in an action on the case, to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*.

And a peremptory *mandamus* shall go, as if the return had been judged insufficient.

So, the person making the return, if judgment be for him, shall recover costs to be levied as aforesaid; or, if judgment be against him, he shall not be liable to be sued in another action for such return.

Before that statute, if a verdict was for the plaintiff in an action for a false return, a peremptory *mandamus* went. Skin. 670.

But an action upon the case does not lie for a false return, till judgment be given upon the return. Semb. 2 Lev. 238.

So, there shall not be a peremptory *mandamus* in B. R. upon a verdict for the plaintiff in action for a false return in C. B. R. Sal. 428.

[No peremptory *mandamus* shall go pending error on action for false return. Str. 983.]

[A peremptory *mandamus* is not a judicial writ, founded upon a record,

(e) 1. An action for a false return will lie against the persons who made such return, though on account of the improper direction of the writ, they need not have made any return. Ld. R. 564.

2. As if a *mandamus* be directed to a corporation by a wrong name, and the members of the corporation make a return, an action will lie against them if it be false. Ld. R. 564.

3. In an action for a false return, it cannot be objected that the *mandamus* would not lie. Ld. R. 125.

4. And whatever is stated before the shewing the grant of the *mandamus*, is but inducement. Ld. R. 126. — In this action the plaintiff shall recover the costs occasioned by suing the *mandamus*. Ld. R. 127.

5. Case lies if the return to a *mandamus*, though true in words, is false in substance. Dougl. 158.

but a mandatory writ, which the court grants when they are satisfied of the parties' right.]

[A peremptory *mandamus* may go before any formal judgment.]

[If judgment for defendant, on an action for a false return, be reversed in the exchequer-chamber and parliament, peremptory *mandamus* shall go. Str. 697.]

So, if upon a motion or disfranchisement a man be removed with force, imprisoned, &c. he shall have trespass, in which the cause of motion may be pleaded, and determined by the court. 11 Co. 99 b.

So, an information lies for a false return, where the public government is concerned. 1 Sal. 374.

If the return be under the common seal, the information may be against the particular persons who procured it. Ibid.

[Where the *mandamus* is not for a private right, so that there cannot be an action for a false return; nor on st. 9 Ann. c. 20. so that the return may be traversed, nor the return wrong, so that there may be peremptory *mandamus*, the court will grant information, as for a false return, to try the fact, as, whether two townships shall join in maintenance of their poor? B. R. H. 184.]

So, if no return be made to a *mandamus*, there shall be an *alias* and *pluries*, and thereon an attachment, without hearing counsel to excuse the contempt. Sal. 434. Pal. 455.

And the court, if necessary, may give a little time, viz. two or three days for the return of each writ. Per Holt, Mod. Ca. 25.

Or, may make the first writ, or the *alias* peremptory. Mod. Ca. 25. D. Skin. 669.

Or, make a peremptory rule for a return of the first writ, upon which there shall be an attachment. Sal. 429. Semb. Latch. 230. Pal. 455.

[The court will make a rule to return a *mandamus*, to admit a man into a trading company. Str. 783.]

[If a *mandamus* directed to two is not returned, the court will grant an attachment against both, though one was willing to obey. Str. 808.]

[If a *mandamus* is not returned, because the mayor and others to whom it is directed are of different opinions, the court instead of attachment will, by consent, direct the right to be tried in a feigned issue. 2 B. M. 798.]

[If the mayor makes a return in the name of the town-clerk and free burgesses without their consent, it is a contempt, and attachment shall go. B. R. H. 188.]

So, by the st. 9 Ann. 20. in cases of officers in corporations, &c. the return shall be made to the first writ of *mandamus*.

[A *mandamus* in town (as to the judge of the prerogative court) should be returned *instantly* at the return. Str. 857.]

[The court expects a return, and will not determine on affidavits, where the party has not opportunity to right himself by an action. Str. 1139.]

[If the party prosecuting a *mandamus* traverses the return, and there is a general verdict for him in part, and a special verdict, and the court of opinion with him, but no damage found, the court cannot grant a writ of enquiry; there cannot be judgment for costs, nor can there be a peremptory *mandamus*. If judgment is entered, that the return is not sufficient to bar A. from being restored, and that it be therefore quashed; it shall

be

be reversed, and *venire facias de novo* awarded. Str. 1051. B. R. H. 295. 377.]

[In such case, the person making the return would be liable to an action for damages. Ibid.]

[On consent, the court will give defendants leave to withdraw their return, and order a peremptory *mandamus*. 3 B. M. 1379.]

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## MANDAVI BALLIVO.

Vide RETURN, (D 3.)

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## MANOR.

Vide COPYHOLD, (Q 1, &c.) — DISMES, (C 4.)

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## MANSLAUGHTER.

Vide JUSTICES, (M 15, &c.)

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## MARINE LAW.

Vide ADMIRALTY, (E 10, &c.)

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## MARINER.

Vide ADMIRALTY, (E 15.) — NAVIGATION, (I 5.) — USES, (N.2.)

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## MARKET.

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(C) ~~Who~~ shall have a market, &c.

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(I) Forfeiture of a fair, or market. p. 60.

### (A) Market.

A market is the privilege within a town to hold a market. Bl. Nom. Verb. Market.

And the usual place where a market is held, is the market, not every place within the same town. Godb. 131.

### (B) Fair.

Every fair is a market, not *è contra*. 2 Inst. 406. 221.

And therefore, where any statute speaks of a fair, a market shall be also comprehended. Ibid.

If the king grant a fair generally, the grantee may keep it where he pleases. 3 Mod. 108.

So, if he grant a fair to be held in such a town, place, &c. he may keep it in what part of the town he pleases. Ibid.

### (C) Who shall have a market, &c.

#### (C 1.) What grant shall be good.

None can have a fair or market, but by grant or prescription. 2 Inst. 220.

So, a fair or market by prescription shall not be extinct by the soil coming to the crown, as other franchises are. Mo. 474.

Otherwise, if the fair or market commenced by grant. Ibid.

#### (C 2.) What not.

But a grant of a fair, or market, has usually a clause, *quod non sit ad nocumentum*, &c. And therefore, if it be to the prejudice of the king or others in any respect, the patent shall be avoided. 2 Inst. 406. 2 Rol. 476. Vide post, (C 3.)

#### (C 3.) How avoided.

If a patent for a fair or market, be to the nuisance, it may be repealed by *scire facias*. 2 Inst. 406. 2 Vent. 344. Semb. 2 Rol. 476.

Though an *ad quod damnum* went before the patent. R. 2 Vent. 344.

Or, the person who has the annoyance, may have a *quod permittat* to throw down such fair or market. F. N. B. 134. A.

Or, shall have an assise of nuisance. F. N. B. 184. A. 2 Inst. 406.

Or, an action upon the case. 2 Sand. 172. 1 Lev. 296.

And by the st. W. 2. 13 Ed. 1. 24. an assise of nuisance lies against an aliance. 2 Inst. 405.

If a market or fair be erected too near my antient fair or market upon the same day, it is a nuisance, and shall be revoked. 2 Rol. 140. l. 10.

Though the words (*nisi sit ad nocumentum*) are omitted in the patent. 2 Rol. 140. l. 17.

So, if it be the day before R. after verdict where it did not appear that the second market was by lawful authority. 2 Sand. 174. Fl. l. 4. c. 28. s. 14. 1 Lev. 296.

But if it be the second or third day after, it is no nuisance. Fl. l. 4. c. 28. s. 14.

If new houses are built in one part of D. where I have a market in another part of D. and merchandizes are there sold, it is a nuisance. 2 Rol. 123. C.

A market, or fair erected, *infra sex leucas et dimidiam et tertiam partem dimidia*, is too near, if it be also injurious; *quia rationabiles dietæ constant ex 20 milliaribus*. Fl. l. 4. c. 28. s. 13.

But *ultra talem terminum non est vicinum*. Fl. l. 4. c. 28. s. 13.

*Et poterit esse vicinum et infra prædict. terminos, et non injuriosum*. Fl. l. 4. c. 28. s. 14.

If a fair or market be to the annoyance of the king, or his people, in any respect, it is a nuisance, though the patent says *si non sit ad nocumentum feriarum vicinarum*. 2 Inst. 406.

But whether it be to the nuisance or not, is matter of evidence. 2 Sand. 174.

### (D) How a fair, or market, shall be held.

By the st. North. 2 Ed. 3. 15. the lord of a fair, at the commencement of the fair, shall publish for what time it shall continue, and shall not hold it beyond his due time, otherwise it shall be seised into the king's hands.

By the st. 5 Ed. 3. 5. if a merchant sell after the time published, he shall forfeit double the goods sold.

By the st. 27. H. 6. 5. a fair or market shall not be held upon principal feasts, Sundays, or Good Friday (four Sundays in harvest excepted), upon forfeiture of all goods sold to the lord of the franchise: And he that has no day for it, but only such festival days, shall hold his fair or market within three days before or after, proclamation being first made; and he that has other days sufficient, shall hold it the full number of days allotted for his market, or fair, such festival days, &c. excepted.

The antient law was; *die dominico si quis mercaturam egerit, ipsâ merce et 30 præterea solidis mulctatur*. 2 Inst. 220.

By the st. Win. 13 Ed. 1. 6. fairs or markets shall not be kept in church-yards.

But a prescription to hold a fair 29th September is good, though it may be a Sunday; for a fair upon that day is not void, though the goods then sold shall be forfeited by the st. 27 H. 6. 5. Cro. Eliz. 485. (f)

### (E) Sale

(f) 1. Though the holder of a market, granted to be holden within a particular district, hold it for more than twenty years upon land without the limits prescribed, the public cannot prevent his removing it within the limits, if the terms of the grant confining it therein can be shewn. 3 East, 538.



## (E) Sale in market overt.

A sale or contract, in a fair or market overt, changes the property, against the party and strangers. 2 Inst. 220. 713.

Against an infant, *feme covert*, *non compos*, a man in prison, or out of the realm. 2 Inst. 713.

Though the *feme covert*, &c. be an executor or administrator. Ibid.

Though no toll paid. 2 Inst. 714.

So, a sale in an open shop in London of proper goods; for every day, except Sunday, there is a market there. 5 Co. 83. b.

So, in Bristol, or elsewhere, by custom. Dub. Mo. 625.

But a sale out of a fair, or market, does not change the property against the rightful owner, who is no party. 2 Inst. 220.

So, the king cannot grant, that a shop shall be a market overt. R. Mo. 625.

So, a sale in a covert place within a fair, or market, does not change the property; as, in a back room or warehouse. R. 5 Co. 83 b. R. Mo. 360. R. 1 And. 344. Poph. 84.

Or, behind a hanging or cup-board, where a man passing before the shop cannot see. R. 5 Co. 83 b. Mo. 360. R. 2 Rol. 122. l. 50.

Or, when the windows of the shop are shut. 1 And. 344. 2 Rol. 122. l. 47.

So, if the sale be of goods improper and foreign to the owner or trade of the shop: as, plate in a scrivener's shop, &c. For a shop in London is not a market, except for goods proper to its trade. R. 5 Co. 83. b. 2 Rol. 122. l. 40. R. Poph. 84. Mo. 360. R. 2 Cro. 69. R. 1 And. 344.

A jewel in a shop, which does not belong to a goldsmith. R. 2 Rol. 122. l. 40.

So, if the sale be covinous. 2 Inst. 713. Jon. 164.

As, where the buyer knows that the seller has no right. 2 Inst. 713.

Or, the seller be of such age, that the buyer knows him to be an infant. Ibid.

Or, if the buyer knows the seller to be a *feme covert*, where she does not use a trade for such things, and does it without the consent of her husband. Ibid.

So, if the sale be in the night after sun-setting, and before sun-rising. 2 Inst. 714.

Or, the treaty for the sale was begun out of the market. 2 Inst. 713. Jon. 164.

So, if there be no sale: as, where no consideration is paid; for that is a gift. 2 Inst. 713.

Or, the goods are the goods of the buyer himself. Ibid.

So, a sale in a fair, or market, does not bind the king. Ibid.

If a man pursue his appeal freshly against a felon of his goods, till he be convicted, he shall have restitution of his goods, though they have been sold in market overt. 2 Inst. 714.

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2. The owner of a market granted to be holden within a particular district, may, after appointing it in one place therein, remove it to another, notwithstanding he may have induced individuals to build on the land adjoining the former place, upon the assurance that he meant to fix it irremovably there; whose remedy, if any, is by action. 5 East, 538.

So, by the st. 21 H. 8. 11. if a felon be convicted by the evidence of the owner of the stolen goods, or by his procurement, upon indictment. Ibid. (g)

So, by the st. 2 & 3 Ph. & M. 7. no sale of an horse stolen binds the property, unless it stand, or be ridden an hour together, between 10 o'clock and sun-set in an open part of the market, and all parties to the bargain come with the horse to the book-keeper, and enter the colour and one mark at least of the horse sold, and pay the toll, if any due, else a penny. Vide post, (F 1.)

And by the st. 31 El. 12. no sale of an horse shall bind, unless the toll-taker, &c. know the vendor and enter his christian, surname, and dwelling, or else one who knows him, and is known to the toll-taker, vouch his knowledge of name, surname, addition, and place of dwelling, which shall be entered, &c. Vide post, (F 1.)

And this statute extends to an horse taken by wrong, though not stolen. R. Jon. 163. 2 Inst. 717.

And is only additional to the common law, and the st. 2 & 3 Ph. & M. 7. all which must be pursued. 2 Inst. 719.

If the seller of a stolen horse in market overt be entered in the toll-book by a false name, that does not alter the property. Per two J. Owen 27. 1 Leo. 158. R. cont. Cro. El. 86.

If a man plead a sale in his shop, he must say, that it was in a shop where he used his trade. R. Mo. 624.

That it was *in pleno mercatu*. Mo. 624.

And a custom, that a sale binds, *modo unus contrahentium sūt liber homo*, is void; for it tends to a monopoly. Mo. 625.

[There can be no market overt for pawning. Hartop v. Hoare, P. 16 G. 2. Str. 1187. 1 Wils. 8. 3 Atk. 44.]

[By 1 & 2 P. & M. c. 7. no person living in the country, out of any city, borough, town corporate, or market town, shall sell by retail within any city, &c. any woollen cloth, &c. except in open fairs.]

[But the inhabitants of a market town, &c. are not prohibited by this act from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair. Doug. 256.]

(g) 1. By 21 H. 8. c. 11. if any felon rob or take away any money, goods, or chattels from any subject within the realm, and be indicted, arraigned, and found guilty thereof, or otherwise attainted by reason of evidence given by the party robbed, or the owner of such money, &c. or by any other by their procurement, the party robbed, or owner, shall be restored to his money, &c. and the justices before whom such felon shall be found guilty or attainted by reason of such evidence, may award writs of restitution for such money, in like manner as if the felon had been attainted at the suit of the party in appeal.

2. The property the party takes upon the attainder is, in case the goods have been sold in market overt, *quasi* a new property; it has no relation back to the time of the robbery, so as to give him a constructive right from that time. 2 T. R. 750.

3. Thus where the party robbed gave the man into whose hands the goods came on a sale in market overt, notice that he had been robbed, and was prosecuting the felon to attainder, which he afterwards effected, notwithstanding which the man before the attainder sold the goods, the court held no action could be maintained against him after the attainder, because at the time of the latter sale the party robbed had no property in the goods. Ibid.

## (F) What duties are payable.

## (F 1.) Toll.

The duties usually paid at a fair or market are toll, stallage, picage, &c. Vide Toll.

Toll is a reasonable sum due to the lord of the fair or market, for things sold there, which are tollable. 2 Inst. 220.

And it was usually allowed for witnessing of the sale. Ibid.

And, by common right, shall be only upon a sale of live cattle, not of victuals, wares, &c. R. Mo. 474.

But, by custom, it may be due for all goods brought to the market. 1 Leo. 218.

So, by special custom, toll may be due for goods not sold. Semb. Lut. 1336.

But that seems to be for stallage. 2 Inst. 221. Mo. 835. 2 Rol. 123. l. 37. Vide post, (F 2.)

If an antient fair or market returns to the crown, and the king re-grants it, the toll passes. Pal. 78.

The judges are to determine, whether the toll be reasonable. 2 Inst. 222.

The Mirror says, that a halfpenny shall be taken of goods of 10s. *et sic pro rata*, so that no toll exceed a penny. Ibid.

And therefore above a penny is an unreasonable toll. Mo. 474.

Above a penny or two-pence. Per Poph. Cro. El. 558.

If the toll granted be unreasonable, the grant will be void. 2 Inst. 220. Cro. El. 558.

So, by the st. W. 1. 3 Ed. 1. 31. if the lord take an outrageous toll, the king shall take the franchise; and if it be by a bailiff, without the command of the lord, he shall render to the plaintiff as much more as he has taken, and shall be imprisoned for forty days. Vide post, (I.)

An outrageous toll is any toll, when there is none due, or the party is discharged of toll. 2 Inst. 220.

Or, if more be exacted than is due. Ibid.

And therefore, an action upon the case lies against him, that takes an outrageous toll, *viz.* of him, who ought to be quit. Yel. 13.

So, toll is not incident to a fair or market: and therefore, a grantee shall not have toll without a special grant. 2 Inst. 220. 716. in marg. R. Cro. El. 558. 592. Mo. 474. R. Pal. 77. 86.

[And therefore, if it is a new fair, custom cannot support it. Str. 1171.]

And therefore, if the king grant a market, &c. *de novo, cum omnibus libertatibus pertinent.*, he shall not have toll. R. Pal. 78.

So, after a fair, or market granted, the king cannot grant a toll without a *quid pro quo*. 2 Inst. 220. Vide Prerogative, (D 18.)

And therefore, it is not sufficient to allege the grant of a market, with all tolls belonging, but there must be alleged an express grant, or a prescription for toll. Lut. 1380.

So, the king cannot grant a toll for goods not brought to the market. Lut. 1502.

So,

So, regularly, toll shall not be paid, before the sale; for it is due from the buyer, not from the seller. 2 Inst. 221. R. Lut. 1336.

So, the king shall not pay toll. 2 Inst. 221.

Nor, tenant in antient demesne, for goods for his tenements or family. 2 Inst. 221. 1 Rol. 321. B. 1 Leo. 233. Vide Antient Demesne, (F 4).

Nor, if a man has a grant to be discharged of toll, for goods for his own use, bought since his grant. 2 Inst. 221.

And he shall be exempted in a fair or market of the king. Ibid.

Though the grant be for him only, it will be good against the king's successors. R. Yel. 15.

A grantee to be quit of toll, may plead his exemption. Lut. 1332.

So, an inhabitant of a borough exempted by charter.

So, an inhabitant of the duchy of Lancaster. Lut. 1379.

And a prescription for an inhabitant is good, being for a discharge. R. Lut. 1380. Adm. 2 Cro. 152.

But if a market, where toll was due by prescription, comes to the king, and he grants the market *cum pertinentiis*, the grantee shall have the toll. Pal. 78.

[The owner of a market cannot distrain for toll the goods brought there to be sold, as damage-feasant, but he has an action for the toll. Ld. Raym. 1589. Willes, 623.]

[Nor, for the toll of goods fraudulently sold out of the market to avoid the toll. Cowp. 661.] (h)

[A claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market and sold there, without shewing any right to toll for goods sold in the market without being brought there. 4 T. R. 104.]

[If the grantee of a market, under letters patent from the crown, suffer another to erect a market in his neighbourhood, and use it for the space of twenty-three years without interruption, he is by such use barred of his action on the case for disturbance of his market. 1 Bos. & Pull. 400.]

[Qu. Whether if no specific toll be granted in the letters patent, the grantee be entitled to any toll, and whether in such case he can support any action for an injury to his market? Ibid.]

## (F 2.) Toll booth.

By the st. 2 & 3 Ph. & M. 7. the owner of every fair or market shall appoint one in a special open place to take the toll, and keep the same place from ten in the morning till sun-set, on pain of 40s., who shall take the toll at the same and no other time or place, and then have before him and enter the names and dwellings of all parties to bargain for any horse, and the colour with one special mark of such horse, on pain of 40s., and shall deliver the book by the next day to the owner of the fair, or market, who shall make a note of the number of the horses sold, and subscribe his name to it, on pain of 40s. on the defaulter.

(h) An action lies by the owner of a market entitled to toll, for selling therein by sample, without paying toll on the entire bulk. 2 Taunt. 120.

By the st. 31 El. 12. no book-keeper shall take toll, or make an entry, &c. unless he truly know the seller of the horse, or his voucher, their names and dwellings, and then shall truly enter the same and the price of the horse, &c. on pain of 5*l.* for every default.

### (F 3.) Stallage, picage, &c.

Stallage is a duty for the liberty of having stalls in a fair or market; or for removing them from one place to another. Pal. 77.

[Erecting a stall in a market is not of common right, stall-keeper must compound as he can. Str. 1238. 1 Wils. 107.]

[And it is a trespass to set tables in a market place, for the sale of goods thereon, without leave of the owner of the soil. 2 Bl. R. 116.]

Picage is a duty for picking holes in the lord's ground for the posts of the stalls. Per Treby, Quo W. 29. Pal. 77.

And it belongs to the soil; and therefore, though a fair granted in Borough-English land go to the eldest son, picage shall be to the youngest son of the grantee. Mo. 474.

By custom, a man shall have toll for goods in a market, sold or not sold; but this seems to be for stallage. Vide ante, (F 1.)

So, he may take for stallage the eighth part of a bushel of corn in every four bushels in specie. 2 Rol. 123. l. 30. 37. Mo. 855.

The owner of an house next to a fair, or market, cannot open his shop for selling in a market, without payment of stallage; for if he takes the benefit of the market, he ought to pay the duties there. Cont. per Dod. But it was R. per. Cur. 2 Rol. 123. l. 30.

If a man prescribe for toll, viz. *pro qualibet stalla* so much, it is well; for toll is a general word. R. Lut. 1519.

So, if there be a prescription for toll, viz. *inter alia pro qualibet stalla*, it is well. Lut. 1519.

Or, for the stall and soil *prope et circa stallam*; for it shall be ascertained by the usage. R. Lut. 1519. (i)

### (G 1.) Court of pyepowders.

To every fair or market, *curia pedis pulverisati*, viz. a court of pyepowders, is incident. 4 Inst. 272. Cro. El. 773.

Or, by custom, may be held where there is no fair or market. 4 Inst. 272.

This is a court of record, in which the steward is the judge. 4 Inst. 272. Skin. 33.

And it cannot be held before the mayor, or other person, except the steward, without special custom. R. Skin. 33., but by special custom it may. 2 Bul. 23.

The jurisdiction shall be, of contracts in the same fair or market, for goods there bought, or sold. 4 Inst. 272.

Or, for battery or disturbance there. D. Cro. El. 774.

Or, for words to the slander of wares in the market. 4 Inst. 272. 10 Co. 73.

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(i) The right to erect stalls, or place tables in a market, is not an incidental privilege of those frequenting it. 2 Blk. 1116.

And therefore, if the proceeding be on a contract in the fair, &c. but not for a thing to be sold there, it will be void. R. Skin. 33. R. 2 Bul. 21.

Or, for slander of another, which does not concern the fair, or the goods there. 4 Inst. 272. R. 10 Co. 73. a. Cro. El. 774.

Or, out of the precinct of the fair or market. 4 Inst. 272.

Or, at a day before or after; though at another fair or market. 4 Inst. 272. 10 Co. 73. Cro. El. 773.

So, by the st. 17 Ed. 4. 2. conf. by the st. 1 R. 3. 6. the steward, &c. shall not hold plea upon pain of 5*l.*, unless the plaintiff or his attorney swear, that the contract, &c. in the declaration, was within the time and precinct of the fair or market.

And if it be sworn, the defendant may plead in abatement, or tender issue, that it was not; and if no oath, or it be found for the defendant, the plaint shall be dismissed, and the party sent to his remedy by common law.

But such oath need not appear upon the record. 4 Inst. 272.

So, if it does not appear in pleading, that the suit there was for a matter within the jurisdiction, it will be void. R. Skin. 33.

So, an information there, for a duty within the market, though it is not void, is erroneous. R. Cro. El. 530.

### (G 2.) How the proceeding shall be.

The proceeding in a court of pyepowders shall be by plaint.

And the cause of action, plaint, &c. ought to arise, and shall be entirely determined at the same fair. 4 Inst. 272.

And therefore, the process shall be returnable *de hora in horam*. Ibid.

But time shall be allowed to the plaintiff upon a writ of enquiry. R. Cro. El. 774.

### (H) Clerk of the market.

Antiently, there was a continual market at the house of the king's court, and a clerk of the market to inquire, whether the weights and measures were according to the standard. 4 Inst. 273.

And he had a court for that purpose. 4 Inst. 273.

And might make process to the sheriffs and bailiffs, to return panels before him. Ibid.

And all estreats were to be returned into the exchequer. Ibid.

By the st. 16 R. 2. 3. he shall have all his weights and measures, according to standard of the exchequer, ready with him, when he makes assay.

But he could hold no plea, except what was held in the time of Edw. 1. 4 Inst. 273.

Nor, limit the price of victuals. 4 Inst. 275.

Nor, break pots, under the measure. Semb. Sav. 57.

Nor, distrain *ex officio* for a fine, in not conforming to the standard. Semb. 1 Sal. 327.

By the stat. 27 H. 8. 24. and 32 H. 8. 26. the king's clerk of the market, and no other, shall use that office within the verge, &c. notwithstanding any grant to any liberty, &c. while it happens to be within the verge.

The

The office of clerk of the market requires, that he set reasonable prices upon provisions in the king's progress, and survey whether they are wholesome, &c. 2 Rush. 373.

The clerk of the market may take reasonable fees. 2 Rush. 375.

By the st. W. 1. 3 Ed. 1. 26. *nul minister le roy preigne reward pur faire son office*; within which statute is the clerk of the market. 2 Inst. 209. 4 Inst. 274.

By the st. 13 R. 2. 4. the king's clerk of the market shall do his office duly, and shall take no common fine, on pain of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence.

And therefore, if he prescribe to have 2*d.* or other rate for viewing, and examining of measures, whether they are lawful or not, it is void. R. 4 Inst. 274.

Yet, by the st. 7 H. 7. 3. (and 11 H. 7. 4.) he shall have 1*d.* for sealing of every bushel, and an halfpenny for a less measure.

### (I) Forfeiture of a fair, or market.

By the st. North. 2 Ed. 3. 15. if a man hold his fair beyond the time allowed, he forfeits the franchise. 2 Rol. 124. l. 30.

So, if he hold his market at another day. 2 Rol. 124. l. 35.

Or, has a fair to hold two days, and he holds it three days. 2 Rol. 124. l. 30.

But if a man hold his market upon the day allowed, and upon another day, he shall not forfeit his market; but shall be punished for the addition of the day. 2 Rol. 124. l. 26.

If a man take outrageous toll, he does not forfeit the market, but the toll only. The st. W. 1. 31. says, *le roy pendra le franchise del marche en sa maine*; but that is till it be redeemed. 2 Inst. 221. R. that the toll only is forfeited. Pal. 82. Quo W. Treby. 37.

## MARQUIS.

Vide DIGNITY.

## MARRIAGE.

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (B 8.) — BARON AND FEME, (B 1, &c. — C 1, &c. — E 1, &c.) — CHANCERY, (3 Z 1, &c.) — DIGNITY, (C 6.) — GUARDIAN, (G 4. — H 7.) — PROHIBITION, (G 15.)

~~Marriage~~ brokerage. Vide CHANCERY, (3 Z 8.)

Dissolution of marriage. Vide PARLIAMENT, (H 3.)

~~Divorce~~. Vide ABATEMENT, (H 43.) — BARON AND FEME, (C 1, &c.) — DOWER, (A 1, 2.) — PLEADER, (2 Y 12.)

~~Forcible Marriage~~. Vide JUSTICES, (S 3.)

~~King's Marriage~~. Vide PARLIAMENT, (H 4.)

~~Marriage Settlement~~. Vide CHANCERY, (3 Z 1, &c.)

MAR-

## MARSHAL.

Vide CERTIFICATE, (C) — COURTS, (E 1, &c. — F). — IMPRISONMENT, (C). — OFFICER, (E 3.)

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## MARSHALSEA.

Vide COURTS, (F). — IMPRISONMENT, (C).

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## MARSHES.

Vide WALES, (A 3.)

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## MARTIAL LAW.

Vide PARLIAMENT, (H 23.) — PREROGATIVE, (C 1, &c.) — WAR, (B 6.)

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## MASS.

Vide JUSTICES OF PEACE, (B 14.)

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## MASTER.

Vide JUSTICES, (L 1.) — JUSTICES OF PEACE, (B 50, &c. 53, &c. 58, &c.) — LONDON, (N 2.)

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## [MASTER AND SERVANT.] (k)

*Master*

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(k) 1. *Relative to the master.*—The possession of a servant, occupying a cottage, with less wages on that account, is that of his master. 16 East, 33.

2. If a servant misconducts himself, the master may dissolve the contract of hiring between them. 2 M. & S. 329.

3. Where a bailiff retains a labourer under the authority, express or implied, of his master, the master is the employer within the stat. 20 Geo. c. 19. 14 East, 605.

4. Action lies for the seduction of a journeyman. Cowp. 54. Loft. 493.

5. No action will lie for seducing an articulated servant from his master, if the servant has paid the penalty stipulated by the articles for leaving. 3 Burr. 1345. 1 Blk. 373.

6. It is actionable to harbour the servant of another after notice, though the party did not originally induce him to leave his master. 6 T. R. 221.

7. A master is under no legal obligation to pay for medicines supplied to his servant, maimed in discharging his duty. 3 B. & P. 247.

8. He may justify an assault in defence of his servant. Loft. 215.

9. If



~~Master of the Rolls.~~ Vide CHANCERY, (B 4.)

~~Masters of Chancery.~~ Vide CHANCERY, (B 5. — W 1, &c.)

~~Master of a Ship.~~ Vide MERCHANT, (E 2, &c.)

## MATTERS.

~~Matters of Law.~~ Vide PARLIAMENT (H 1, &c. — I — K).

—— Civil. Vide PARLIAMENT (H 9, &c.)

—— Criminal. Vide PARLIAMENT, H, 6. &c.) — PROHIBITION;  
(F 6.)

—— Marine. Vide ADMIRALTY, — NAVIGATION, — PARLIAMENT,  
(H 25.)

—— Marital. Vide PARLIAMENT, (H 22, &c.)

—— Matrimonial. Vide PROHIBITION (G 15.)

—— Testamentary. Vide PROHIBITION, (G 16, &c.)

9. If a master encourage his apprentice to go to sea, and he takes a prize, equity will not assist him to receive his apprentice's share of the prize-money. Dick. 130.

10. A master is liable for every act of his servant done by him in the course of his employment. 2 T. R. 154.

11. A master is not answerable for every act of his servant's life, but only for those done in his relative capacity; therefore to charge the master as such for his servant's misconduct, it must always be shewn or presumed, that the relation of master and servant subsisted between them in the particular affair. 1 East, 106.

12. It seems, that if the servant of a baker, without his master's knowledge, mixes a noxious article with the bread, the servant only, not the master, is indictable. 3 M. & S. 11.

13. Evidence of buying a libel in the shop of a known bookseller, is sufficient *prima facie* evidence to convict him of publication. 5 Burr. 2686.

14. The act of the servant, as such, is that of the master; if, therefore, the occasion of injury to another, in an action against the master, it may be stated as his own. 6 T. R. 659.

15. *Relative to the servant.* — Where, on the purchase of a horse, the vender had given a warranty of soundness generally, and the servant who was sent with the receipt to the agent of the other party, inserted, at his request, but without a special or general authority from his master, after the words warranted sound, "to the regiment," — Held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. 1 Smith, 400.

16. A servant is not protected, even in a penal action, from the consequences of obeying his master's orders, if the master had no authority to direct him. 5 T. R. 19.

17. A servant, ignorantly meddling with another's property, by command and for the use of his master, is liable to the owner. 4 M. & S. 259.

18. Semble, a servant imprisoned under 20 G. 2. c. 19. s. 2. is not entitled to wages, during the time of his imprisonment. 2 M. & S. 529.

19. Where, by the terms of a contract of service, the wages are not payable until the time of service has expired, and the servant dies, or the service is otherwise terminated without the master's fault, in the interim none are due *pro tanto*, unless under a custom or usage. An exception to this rule is the case where a seaman is impressed. 6 T. R. 320.

20. The circumstances that a master having discharged a servant, requested the master with whom he lived before, not to give him another character; and that on application to himself for a character, he gave the servant a bad one; are sufficient whence malice may be implied. 3 B. & P. 587.

## MAYHEM.

Vide BATTERY, (B — E 1, &c.) — JUSTICES, (S 6.)

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## MAYOR.

Vide COURTS, (O 3.) — DISMES, (M 6, 7.) — FRANCHISES, (F 22.) —  
LONDON (C) — STATUTE STAPLE, (D 1.)

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## MEASURES.

Vide JUSTICES OF PEACE, (B 90, &c.) — LEET, (L 6 &c.)

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## MEDIETAS LINGUÆ.

Vide ALIEN, (C 8.)

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## MEERS.

Vide CHASE, (G 1.)

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## MELIUS INQUIRENDUM.

Vide OFFICER, (G 12. — K 12.) — PREROGATIVE, (D 67, &c.)

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## MERCHANT.

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## (A) Merchant, who shall be.

There are four species of merchants: — merchant-adventurers, merchants-dormant, travellers, and merchants-resident. 2 Brownl. 99. Vide Trade, (A 1, &c.)

And, generally, every one shall be a merchant who traffics by way of buying and selling, or bartering of goods or any merchandize, within the realm, or in foreign parts. Sal. 445.

So, if a man draw a bill of exchange, he will be a merchant for that purpose. Vide post, (F 4.)

## (B) Factor.

A factor is authorized by a letter of the merchant, with a salary, or an allowance for his care. Ma. 81. (b)

And the same person may be factor for many different merchants. Ibid.

Every factor must pursue his commission strictly. Ibid. (c)

And by his general commission has authority to sell upon credit. 2 Ca. Ch. 57. (d)

[A fac-

(b) 1. A middle-man who has restrained a sub-agent for his principal, is not liable for the sub-agent's misconduct; since he is the mere instrument by which a contract between two was made. 6 T. R. 411.

2. A remittance by bills, directing payment to a third person out of the proceeds, when received, will not render the receiver liable to such third person against his consent. 14 East, 582.

3. A general remittance to bankers to whom the receiver is indebted, accompanied by a letter, requesting him to pay certain sums to particular persons (not expressly out of the sum remitted), does not so fix the bankers as to give the persons to whom such sums were so directed to be paid, a right of action against them for money had and received, without an assent, on their part, to such an appropriation of the money remitted. An express dissent by the bankers is not necessary to protect them. 3 Price, 58.

4. Though an agent will not be chargeable on a contract made by him as such, yet, if he receives money from his principal to satisfy it, he becomes bailee to the other party's use, and liable to him for the money received. 1 East, 135. Id. 579.

5. Alienor of land, continuing in possession, is evidence of authority from the alienor to do acts binding upon the property. 7 Taunt. 374.

6. In an action for usury in discounting a bill, where it was proved that one Brown demanded payment of the acceptor, and commenced an action against him to compel payment; in consequence of which, a person on behalf of the acceptor, paid to Brown the amount of the bill, and the costs of the suit; on producing the bill for which Brown gave the receipt, as the attorney for the defendant; and no account was given how Brown came by the bill. Held, that there was sufficient evidence to be left to a jury, that Brown acted as the defendant's agent, and consequently that the defendant had received usurious interest. 1 N. R. 101.

7. The phrase, "a commission *del credere*," is commonly used to express the contract, by which the broker guarantees the solvency of the purchaser. But, strictly speaking, it means the premium,—the commission,—paid to the broker for guaranteeing the purchaser. 4 M. & S. 574.

(c) The remedy against an agent for selling under the fixed price, is, not trover, but a special action. 3 Taunt. 117.

(d) 1. Whatever the duty of an agent requires him to do in the business of his employers, must be presumed so to be done with their knowledge and direction. 1 Rose, 447.

2. A principal is bound by the act of his agent, where his former course of dealing sanctions the inference that the agent had authority for his conduct, though in fact it was contrary to his directions. 15 East, 400.

[A factor has power to sell, and thereby bind his principal, but he cannot bind or affect the property of the goods, by pledging them as a

3. The sale by a broker, whose ordinary business it is to sell, of goods placed by the owner in his possession generally is binding. 15 East, 38.

4. Sale by one who had fraudulently obtained the means to hold himself out as owner, held good against the principal. 7 Taunt. 265. 1 Moore, 12.

5. A general agent,—the factor, for example, of a principal abroad, may, by exceeding his instructions, bind the principal. 3 T. R. 757.

6. A special agent, that is, one constituted such for a particular purpose, and under a limited and circumscribed power, cannot go beyond his instructions. 1 T. R. 205. 3 T. R. 757.

7. Distinction between a general and special agent as to their powers to bind the principal. 1 Ves. & Beam. 209.

8. If the holder of a bill give it to an agent to get it discounted, he is bound by the agent's guaranteeing its payment, unless he told him that he would not warrant the bill, as by saying that he would not indorse it. 4 T. R. 177.

9. A guarantee, given by an agent unknown to his principal, confers no right either of stoppage *in transitu* or lien. 4 Taunt. 242.

10. Acts by an agent, whose authority has been revoked, are binding upon the principal until notice of the revocation. 5 T. R. 215.

11. If a principal is not bound by his agent's contract, a subsequent promise to be answerable, is *nudum pactum*. 3 T. R. 757.

12. A receipt given by the creditor to an agent or broker, does not necessarily of itself operate as a discharge to the principal; nor has it that effect, unless the principal appears to have dealt differently with his agent in consequence of the receipt, as by passing it in his accounts, and giving him further credit upon the faith of that voucher. 3 East, 147.

13. Vendor bound by the signature of the agent's clerk, thus: "Witness Evan Phillips for Mr. Smith, agent for the seller," upon evidence of assent; but clerks of agents in general have no authority to bind the principal. 9 Ves. 234.

14. Purchaser under a particular giving a false description, not bound at law or in equity, nor by any act of his agent without a fresh authority or subsequent application: a different agreement requiring a fresh authority. 18 Ves. 509.

15. Agent authorized to make agreements for leases for lives or years, makes an agreement in which the term of the proposed lease is not mentioned. This is an agreement not pursuant to his authority, and not binding on his principal. 1 Sch. & Lef. 33.

16. Government allowing the colonel of a regiment to appoint his own agent, the colonel is answerable for such agent, not by virtue of any security which he gives to government, but by operation of law. 3 Mer. 578.

17. A principal is answerable for the act of his agent in concealing or suppressing of deeds, though not done with the knowledge of the principal. Sch. & Lef. 209. 222.

18. Notice to an agent, in order to affect the principal, must be to an agent empowered to treat, not barely to carry proposals from one party to another. 1 B. C. C. 358.

19. Notice to an agent in order to bind his principal must be in the same transaction; and this though the agent acted as attorney for the vendor and vendee. 3 Mad. 34.

20. Notice to agent held to affect principals. 2 Eden. 224.

21. The acts of an agent, as such, are the acts of his principal. Therefore, in suits by or against the principal, verbal or written admissions by the agent, may be given in evidence, without producing him. 3 T. R. 454.

22. An agent's letters are not evidence. 4 Taunt. 511.

23. If an agent or attorney is empowered by the principal to adopt such measures as may secure his claim against a debtor, and the measures adopted are unlawful, the principal is not liable unless he was actually privy to them. 4 East, 1.

24. A. having a house by the way-side, contracted with B. a surveyor, to repair it for a fixed sum, who engaged C. to do the work, and C. contracted with D. to furnish the materials, whose servants in bringing them, through negligence, injured the plaintiff Held, that the several retainers were under an implied authority from A. who therefore was liable for the damage occasioned. 1 B. & P. 404.

25. The agent's narrative are not evidence against the principal. 4 Taunt. 511.

26. The letters of an agent in a foreign country, detailing the contents of letters from another agent; are not evidence against the principal. 4 Taunt. 565.

security for his own debt, though there is a bill of parcels, and a receipt. Str. 1178.] (e)

So, if a loss happens to the merchant, the factor shall be excused, if he does not act contrary to his commission. Ma. 81.

But if a factor does not pursue his commission, he shall lose his factorage, and shall answer to the merchant for his damage. Ibid.

And therefore, if a factor gives more, or buys less in quantity or quality, than his commission requires, the merchant may disclaim, and the factor shall take the goods bought to himself. Ma. 82.

[If A. merchant in London, orders B. merchant abroad, to buy him goods at a price limited, B. exceeds the price, and sends the goods, A. refuses the contract, but disposes of the goods as his own, and at a risk; he shall not be deemed the factor of B., but to have accepted, notwithstanding what he said; and shall account with B. according to the price B. paid. 1 Vesey, 509.]

So, if he ships them for a different port or place. Ma. 82.

So, if he sells for a less price than was directed, without sufficient reason, he shall make satisfaction. Ma. 82.

If he sells without giving advice, to make a profit to himself. Ibid.

Or, sells to A. who was insolvent, without a special direction, or plain ignorance. Ma. 83.

If a factor sells to A. for his principal, and before payment sells for himself, and takes money for himself, he shall answer so much for the debt to his principal; for he cannot receive his own debt to the prejudice of the debt of his master. Ma. 82.

[Where the custom of the trade is, that the factor sells goods at his own risk, for which he has an additional allowance; no credit is given as between owner and buyer, and the buyer is not answerable to the owner, though he gives him notice before payment not to pay to the factor, who has failed. By the jury, against the direction of Lee C. J. and by a special jury on a new trial, still against C. J.'s direction. Str. 1182.]

[If a merchant directs his factor or correspondent to insure, and he charges him with it as if done, and loss happens, he shall be charged as insurer; but if factor employs an agent, this equity will not extend to that agent. 2 Vesey, 239.]

If he makes a false entry at the custom-house, whereby the goods are forfeited. Adm. Ca. Ch. 25.

And therefore, if a factor in a foreign kingdom do not pay the customs, he shall have them to himself, and shall not be accountable to his principal. R. Ca. Ch. 25. Id. 76.

Otherwise, if he does not pay the customs to the king. R. Ca. Ch. 30.

If a factor takes security by an obligation of A. upon a sale of goods,

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(e) 1. A factor cannot pledge the goods of his principal; so that the principal may recover them from the pawnee by a tender to the factor, without any to the pawnee, of his balance. 5 T. R. 604.

2. Where goods from abroad are consigned to a factor to sell under a bill of lading, though he may indorse the bill to a vendee, yet he cannot assign it merely as a pledge. 2 Smith, 207. 6 East, 17.

3. A factor cannot pledge the goods of his principal, though the pawnee is ignorant that he is not the owner, and though the bill of lading under which they have been consigned is general. 1 M. & S. 140. Unless where the principal has held him forth as the owner. Id. 147.

4. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. 5 Ves. 211.

without authority, in his own name, he shall answer, if A. fails. Semb. 2 Ca. Ch. 57. (f)

(f) 1. *Agent's rights against principal.* — Where the commission payable to a broker for chartering a ship, is a percentage of its freight, the amount of which is contingent, he cannot sue until the contingency is determined. 3 Taunt. 531.

2. A. consigns goods to B. abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to A.'s captain, B, stating it to be on A.'s account as A.'s own goods, and to be delivered to A. The return cargo, consisting of more goods than the proceeds of those consigned to B., B. draws bills on A. for the difference, which he sends to his agent with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refuses to accept the bills, and the bill of lading is accordingly indorsed to C. The ship arrives; and C. demands the cargo as indorsee of the bill of lading; the captain, however, refuses, and delivers them to A., who deposits them with D. as his warehouseman. D. then receives notice from B. to hold the goods for B. as his property, in consequence of which D. refuses to re-deliver them to A. In trover by A. against D., held that D. was not estopped, by having received the goods as the warehouseman of A., from setting up the claim of a third person as a defence, supposing that claim to be a good one. 1 Mars. 323. 5 Taunt. 759.

3. If a principal refuses payment upon a contract made through his agent, and the agent not being himself liable, but for the sake of his own character, which would be affected by the discredit of his principal, chooses to pay the money of his own accord, he cannot recover it, though the principal might himself have been compelled to pay it in the first instance. It would be otherwise, however, if the agent were, expressly or impliedly, (as by the usage of the trade,) a guarantee for the fulfilment of the contract by his principal. 8 T. R. 610.

4. *Lien.* — The debt, in respect of which a lien is claimed by an agent, must be due to him in his own right, and not as agent for another. 3 B. & P. 485.

5. An agent has not any general lien in respect of debts incurred prior to the time at which he begins to be employed in that character. 3 B. & P. 485.

6. Where a factor receives goods for a specific purpose, such as to sell and pay over the proceeds, he has not that lien on them for his general balance, to which on a general deposit he would be entitled. 6 T. R. 258.

7. A factor who becomes surety for his principal, has a lien on the price of the goods sold by him for the principal, to the amount for which he has become surety. Cowp. 251.

8. Where a factor having a lien upon goods, pledges them to his creditor for a debt, without notice of such lien, and without any express intention at the time of making the lien the subject of pledge, the pawnee of the goods cannot take advantage of this lien in defence to an action in trover at the suit of the owner. 3 Smith, 3. 7 East, 5.

9. *Revocation of authority.* — If, whilst goods are *in transitu* from a principal to his agent, the principal dies, whereupon the executor directs the carrier to follow the former orders, who, in consequence, delivers them to the agent: the agent has the same lien thereon as he would have had, had the death not intervened. 2 East, 227.

10. Plaintiff being entitled, upon coming of age, to the produce of a West India estate, bills of lading of consignments previously made were decreed to be delivered up to him. 4 Ves. 609.

11. *Duties.* — An agent is not liable for disobeying his instructions, if obedience to them would not have secured the principal from the loss sustained. Thus, for neglecting to insure a ship which had been guilty of deviation. 1 T. R. 22.

12. Where a principal abroad has a right, or has been induced to expect that his correspondent here will obey an order to insure, the correspondent is liable for neglecting it. As, 1. Where he has effects in the correspondent's hands: — 2. Where, though he has no effects, yet the course of dealing has been for the correspondent to insure on receiving the order; since he has a right to suppose that he is to be continued, the correspondent not having discontinued it by notice: — 3. Where the merchant sends bills of lading with an order to insure, and the correspondent retains the bills; since the commission being entire, he cannot adopt one part and reject the other. 2 T. R. 187.

13. A broker who purchased goods upon credit, is bound to forward them to his principal in the ordinary course of dealing; which, if he does not, he has no claim upon the principal who refuses to accept them. 3 Taunt. 32.

14. An agent to whom a bill is remitted is justified in receiving payment by a check; and therefore is not answerable though it is dishonoured. 6 T. R. 12.

15. An

15. An agent who has a general authority to receive payment, which is a question purely of fact, may, without collusion, receive in what manner he chooses, so as to acquit the debtor, provided it be such as the course of trade warrants. 1 M. & S. 545.

16. Where a banker is instructed by the acceptor of a bill received from a customer, to countermand payment, he is not bound to acquaint the customer therewith. 1 M. & S. 545.

17. *Liabilities*.—Where an agent contracts under a commission *del credere*, the principal has two securities: 1. the agent: 2. the contracting party. And he may sue the broker, without a demand first made upon the contractor. 1 T. R. 115.

18. A. employs B. to sell goods for him. C., as B.'s broker, procures a purchaser and draws a bill for the amount, payable to A., which is accepted by the purchaser, but dishonoured. Held, that C. is answerable to A. as drawer of the bill. 1 Mars. 318. 5 Taunt. 749.

19. Joint factors, when consignees, are each answerable for the other. 3 Wils. 114.

20. *Contracts*.—An agreement by a broker with his principal, to indemnify him from any loss on the re-sale of goods purchased through the intervention of the broker, imports an engagement or insurance that he shall have the opportunity of selling at the same price, and that if it does not offer, that the broker will make good the difference. 3 T. R. 524.

21. *Sub-agent*.—Where A. employed a surveyor in the way of his trade, who ordered goods from B. for the work in hand, A. was held liable to B. 15 East, 66.

22. A subordinate agent, employed to do parts of work contracted for by the superior agent, cannot sue the principal. 6 Taunt. 148.

23. A., on the recommendation of his agent, employs B. to convey goods from this country to the continent. B., without the knowledge of A., employs C. to transact the business, and the goods are accordingly shipped by C. and landed on the continent by C.'s agents. Held that there was no privity between A. and C., and therefore that C. was not entitled to recover his charges, or those of his agents, from A., though A. had not paid the amount to B. 1 Mars. 500. 6 Taunt. 147.

24. A. consigns goods to B. with directions to pay over the net proceeds to C. B. employs D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight, &c. as B., who was the owner of the ship in which the goods were brought, might have made. 1 Mars. 223. 5 Taunt. 584. 672.

25. A principal employs a broker, from the opinion he entertains of his personal skill and integrity; the broker, therefore, without some custom in the particular trade, of which, as the principal knows of it, he may be supposed to approve, cannot place the interest of his principal in the hands of another; and if he does, that other can, by his interference, acquire no rights against the principal. A. consigns goods to B.; B. being in embarrassed circumstances, and not having funds of A.'s to discharge freight and duties, applies to C. to take charge of the consignment, sell it, having first paid the freight and duties, B. agreeing to divide the commission with him. Held, that C. had no lien on the property against A. for the sum advanced, and therefore that A. might recover in trover the full amount of the goods, without a deduction for the allowance. 2 M. & S. 298. 301. n.

26. A. having received money as agent for B. and others, in specific proportions for each, pays it over to C. as a banker, in his own name, and having drawn one part of it, directs C. not to pay away the remainder, except by his order. Held, that C. is bound to hold the money for A., and that therefore B. cannot recover the remainder of his share from C., though he had given C. notice that A.'s agency was at an end. 1 Mars. 132. 5 Taunt. 147.

27. *In relation to third persons*, et vide supra. An agent and his principal are to be considered as one and the same person. 1 T. R. 205.

28. The actions and knowledge of an agent are those of his principal. 1 T. R. 12.

29. The act of an agent is that of his principal; so that the fraud of the agent though unknown to the principal, vitiates the transaction. 4 T. R. 39.

30. Payment to an agent or servant, usually accustomed to receive for the principal, is payment to the principal; *secus*, to a servant not so accustomed; or where the payment is upon a special account, not to be presumed within the nature of the servant's authority, unless expressly given by the master. Loft. 593. 7 Ves. 470.

31. Sometimes contracting parties agree that the agent, and not his principal, shall be answerable, when the contract being made by the agent as principal contractor, he alone is liable thereon. If, therefore, the seller of goods knowing that the buyer, though dealing with him in his own name, is in fact only agent for another, debits him, he cannot afterwards sue the principal. 15 East, 62. 4 Taunt. 574. 1 T. R. 173.

32. So metimes, by the usage of trade, the credit on a sale is understood to be given to the agent or buyer; an usage which obtains in the case of a foreign principal. 15 East, 62.



33. If A. purchases goods of B. for the purposes of re-selling them to C. charging him a commission, B. cannot recover the price from C. who selects the goods, and stipulates the terms on which B. shall sell. 4 Taunt. 574.

34. Where there is a choice between a dormant principal and his agent, the opposite party, by electing one as liable to his claim, discharges the other. 15 East, 65.

35. If an agent exchanges, without authority, the property of his principal, the property given in exchange will belong to the principal. The rule is a rule of natural justice, and there is no principle of law which requires that in his particular case justice should be sacrificed to a general rule. Besides, there is this principle of law in its favour, that a man shall never be a gainer by his own misconduct. 3 M. & S. 562.

36. Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms, upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case; us, where for want of notice of an adverse claim a strict account cannot be given; merely giving liberty to apply upon any question of evidence. 15 Ves. 432.

37. An agent cannot sue on a simple contract expressed to have been made with him as such. Hence, where A. agreed in writing to pay the rent of certain tolls "to the treasurers of the commissioners of X," and the treasurer sued on the agreement, the defendant had judgment. 3 B. & P. 147.

38. A broker selling goods as a principal, without disclosing his employer's name, does not, so far as his own interests are concerned, thereby acquire to himself the rights and character of a principal; not though he be acting under a *del credere* commission, since thereby he only guarantees the solvency of the purchaser, without acquiring an interest in the property greater than in common cases. 1 M. & S. 576. 4 M. & S. 566.

39. It follows from the above, that the price of the goods cannot be considered as a debt due to the broker, and therefore, cannot be set off by him as such in an action brought for a debt due to the purchaser; nor as mutual credit in a suit by the purchaser's assignees after his bankruptcy. 1 M. & S. 576. 4 M. & S. 566.

40. But clearly there cannot be such set-off, where the broker, without expressly disclosing his principal's name, sufficiently intimates that he is acting only as a broker; or, without declaring it at the time of sale, does so before any steps have been taken to carry the contract of sale into effect. 1 M. & S. 576. 4 M. & S. 566.

41. The circumstance that a broker is acting under a *del credere* commission from his principal, thereby guaranteeing to his principal the solvency of the contractor, does not invest him with the rights of his principal where the contract is made in the name of the principal, or being made in the broker's name, the circumstance that he is only acting as agent is unknown to the contractor. *Aliter*, where the contractor knows that fact, and makes the contract with the broker as principal. Though in this latter case the principal may interfere, unless the broker has a lien, or has made payment. 2 M. & S. 112.

42. It is no breach of the duty of a broker (of London) to contract in his own name for the goods he is employed to purchase, being instructed so to do. 7 Taunt. 260. 1 Moore, 6.

43. That a principal may be liable on a deed executed by his attorney, the execution must be in his name. 6 T. R. 176.

44. To secure an agent from liability on a deed made by him as such, it must distinctly express, that he is only acting therein as agent, since no evidence to controul its purport will be received. This may be done by writing opposite the seal, "For C. D. (the principal) A. B." (the attorney). 2 East, 142.

45. Where one covenanted for himself, his heirs, &c. and under his own hand and seal for the act of another, he was held personally liable, though the deed described him as covenanting for and on behalf of that other. 5 East, 148. 1 Smith, 361.

46. Signing an agent's name by his direction, is not a deputing of his authority. 4 Taunt. 209. And an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A. 2 Cox, 84.

47. An agent is not liable on a contract under seal made by him expressly on account of his principal. 1 T. R. 674.

48. An agent avowedly contracting on behalf of government, is not liable on the contract, whether under seal or by parol. 1 T. R. 172. *Id.* 674.

49. A bill drawn on a factor, and payable out of the produce of goods in his hands after discharging prior acceptances, and accepted by him generally, is chargeable on him, notwithstanding any balance then due to him in a running account with his principal. 2 Blk. 1072. *Vide supra*, 173

50. Money had and received, will not lie against a known agent, or receiver, for money paid voluntarily to such agent for the use of his principal, unless he had notice to retain before payment over. 4 Burr. 1986.

51. An agent is liable for paying over money after notice. Cowp. 566.

52. Where money, to which the principal is not entitled, is paid to an agent by compulsion, he is not discharged by a payment over. 1 Taunt. 359.

53. If a party who has paid money to an agent on account of his principal, becomes entitled to recalc it, he may sue the agent, provided no change since the payment has taken place in his situation. Merely forwarding his account to his principal, accrediting him with the payment, is not an alteration. 3 M. & S. 344.

54. The mere passing of money on account, or making rest without any new credit given, fresh bills accepted, or further sum advanced for the principal in consequence of it, is not equivalent to a payment over. Cowp. 565.

55. The statute of frauds does not preclude evidence that a written contract to buy goods was on the buyer's side made by him as agent for another. 7 Taunt. 295. 1 Moore, 45.

56. Where a factor (here, *del credere*) sells goods without naming his principal, or intimating that he is acting for another, the buyer, ignorant of that circumstance, may set off against the principal's suit any demand which he had against the factor. 7 T. R. 359. Id. 360.

57. An agreement having existed between the successive vicars and churchwardens of a parish, that certain fees should be taken upon the burial of strangers in the churchyard, and divided equally between them; the in-coming vicar refuses to accede to that agreement, and prevails on the collector of the fees to pay over to him the whole of what he then has in his hands. Held, that the collector having received one-half of these fees to the use of the churchwardens, they are entitled to recover that moiety from the vicar, in an action for money had and received. 1 Mars. 589. 6 Taunt. 277.

58. A payment by one party to the other's agent before the time appointed, and without the other's consent, is at the risk of the payer. 15 East, 432.

59. *Matters in equity*—Factor buying goods which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant instead of taking factorage duty or a stipulated salary, must account: so must a manufacturer, who obtained by collusion an unfair price. 1 Ves. jun. 289.

60. An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. 2 Ves. jun. 317.

61. Account between principal and agent settled from loose papers; the agent having kept no regular books. After his death liberty was given to surcharge and falsify upon allegation of errors since discovered. 4 Ves. 411.

62. On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full; which was allowed only as proof of the particular payment, not of a general release or discharge on an account stated; though under circumstances it might have that effect; as upon proof, that the principal never would give any vouchers, and an account kept by the steward. 5 Ves. 87.

63. Accounts opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. The character of the defendant, as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the plaintiff in not bringing forward the demand at an earlier period. 5 Ves. 485. Affirmed on re-hearing.

64. Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts. 7 Ves. 584.

65. Accounts opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. The character of agent accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person: as the laches of the plaintiff in not bringing forward the demand at an earlier period. The decree affirmed on a re-hearing. 7 Ves. 599.

66. Accounts settled between two agents without vouchers upon confidence, not to be considered settled against their principal, without liberty to surcharge and falsify. 7 Ves. 617.

67. Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in Ireland; and an enquiry into the circumstances of a case granted under his direction, and in which he took an interest. 13 Ves. 47.

68. Claims by the agent for expences on account of the principal, which from the conduct of the agent, undertaking the business without authority or agreement, could

## (C) Broker. (g)

Brokers are persons employed among merchants to make contracts between them, and fix the exchange for payment of wares sold or bought. Ma. 143.

And by usage in London, freemen of the city selected out of the companies of which they are free, and presented by six at least approved members of their company to the mayor and aldermen, and by the court of aldermen allowed, have been admitted and sworn to be brokers in London. Vide the st. 1 Jac. 21. s. 1. [Vide also the st. 6 Ann. c. 16.]

[Qu. Whether the selling goods by auction within the city of

not be ascertained, disallowed. Interest not carried farther than the time the bill was filed on the ground of acquiescence. 11 Ves. 358.

69. A confidential agent, in that character bound to keep regular accounts, having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, was, on the ground of gross neglect of duty, not allowed a charge in respect of bills of costs for business done as a solicitor. 8 Ves. 363.

70. A. employs B. to get bills which he had not indorsed discounted for him; B. in order to effect the discounting indorses them. Held, that A.'s estate must relieve B. from the liability incurred by the indorsements. 1 Buck. 113.

71. Agent employed to sell estates, took them for himself, under colour of a fictitious purchase; and sold part: after his death an inquiry was directed to ascertain the real value; according to which his estate was to be charged; the principal having an option to take what remained unsold: and the agent having fraudulently prevailed on his principal to execute a lease under the real value, the agent's estate was charged with the loss arising from that. 4 Ves. 411.

72. *Banker.* — Bill by banker, for an account of shares held in trust for him in a mercantile establishment, dismissed; the trust being in contravention of the stat. 29 Geo. 2. c. 16., which prohibits bankers from being traders. Ball & Beatty, 360.

73. The bankers' act 33 Geo. 2. c. 14. s. 4. is not applicable to cases of mutual dealings between a banker and his customer. 1 Ball & Beatty, 249.

74. Country bankers entitled to a commission on the discount of bills, although sent to them from London by a person resident there. Ex parte Jones, 1 Rose, 29. 17 Ves. 332.

75. *Consignment.* — The act of the consignee in respect of the cargo, binds the consignor. 1 Taunt. 300.

76. A covenant to consign property does not convey any interest therein, or make the party consignee, it being a transaction sounding in contract only. 1 T. R. 205.

77. The inference from a general consignment is, that the consignee is a purchaser. 1 Taunt. 300.

78. The consignor inclosed the invoice, and a bill of lading, in a letter to the consignee, informing him that he had drawn upon him at three months. The invoice expressed that the goods were shipped for account and risk of the consignee, and the bill of lading was for delivery, paying freight. Held, that the property vested on the shipment in the consignee. 5 East, 585.

79. Where A., under previous agreement, consigns goods to B. in trust to indemnify with the proceeds C., against money which he may advance, and indorse to him the bills of lading, the property therein vests in B. on delivery to the captain. 1 B. & P. 563.

80. When goods are consigned to a factor, they remain the property of the principal, though subject to the factor's lien for his general balance; which lien, however, as it only vests on the factor's obtaining possession of the goods, may be forestalled by the consignor's countermanding the delivery. Part payment of freight by the factor to the captain, does not amount to a taking possession. 3 T. R. 119. 783.

81. After the lapse of fifteen years from the delivery of goods consigned for sale, a presumption arises in favour of the consignee, that he has duly accounted. 1 Taunt. 572.

(g) Vide *supra*, (B.)

London by an auctioneer who has paid the duty of 20s. for a licence, required by the stat. 17 Geo. 3. c. 50., but who has not been admitted as a broker, makes him liable to the penalty of the statute for acting as a broker, without having been so admitted? *Sembl.* that it does not. 2 H. Bl. 555.]

But pawnbrokers, who buy and sell goods upon pawn, use an unlawful trade. Kelg. 50. [Vide stat. 30 Geo. 2. c. 24.]

And by the stat. 1 (or 2) Jac. 21. s. 5. a sale or pawn to them of goods purloined, or stolen at any place within the city or liberties of London, or in Westminster or Southwark, or within two miles of London, shall not alter the property of the goods so purloined or stolen.

And an action lies against them by the owner for such goods, though the felon be not prosecuted. Kelg. 50.

And by the same stat. s. 7. if the owner require the pawnbroker to shew him such goods, and tell how he came by them, or how he hath disposed of them, and he refuse to disclose them, he forfeits double the value. [Vide stat. 30 Geo. 2. c. 24.]

[For the regulation of pawnbrokers, see 25 Geo. 3. c. 48. 27 Geo. 3. c. 37.]

### (D) Lex Mercatoria.

There shall be no survivorship. (*h*)

*Lex mercatoria*, or law-merchant, is part of the law of England. Co. L. 11. b. 2 Rol. 114.

(*h*) AS TO THE LAW OF PARTNERSHIP. — *And first, at law. — Who are partners. —*

1. To make a person liable as a partner, there must either be a contract between him and the ostensible person to share in the profit and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable. Doug. 371.

2. An agreement to share profits alone, cannot prevent the consequence of also sharing losses with respect to creditors. 4 East, 146.

3. If a creditor, having been jointly concerned with his debtor, agree with such debtor to be jointly and equally concerned in an adventure abroad, and that such debtor shall purchase and pay for goods for the adventure, and the returns shall be made to the creditor in liquidation of his debt; and, in consequence of such agreement, the debtor purchase goods for such adventure, it is a partnership agreement, and both debtor and creditor are liable to the vendors. 12 East, 421.

4. A. and B., ship-agents at different ports, entered into an agreement to share in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. It was, however, expressly stipulated between A. and B., that they were not to be accountable for each other's losses. Held, that although with respect to each other they were not to be considered as partners under this agreement, yet they had made themselves such with regard to all persons with whom either contracted as a ship agent. 2 H. B. 235.

5. *Who not.* — A. B. and C. agreed that as much oil as could be procured in A.'s name only should be purchased, and they take aliquot shares of it; the oil was bought accordingly, and B. and C. were held not liable to the seller as partners with A., since it did not appear that the parties were jointly to resell the goods. 1 H. B. 37.

6. A. B. and C. agreed to join in a mercantile adventure to G. They were each to purchase separately, and to pay for separately, goods which were to be shipped for G. in the same vessel, and they were to share in the profits, if any, and the losses, if any, on the whole outfit, in proportion to the value of the goods each brought in. Held, not partners, and, therefore, not liable each on the other's purchase. 4 T. R. 720.

7. If one, purchasing goods for exportation, permits another to become partner in the adventure, the second does not thereby become liable to the vendor for the price of the goods. 4 Taunt. 582.

8. Joint

8. Joint-proprietors of a stage-coach by agreement, made known, *comme semble*, to the public, horse separately the several stages of the road. Held, that each was liable, and not the others, for goods furnished for the use of his horses. 2 Taunt. 49.

9. Money lent to a trader by a partner who retires from business, at legal interest, with an additional annuity, for a certain term of years, is not a continuance of the partnership. 2 Blk. 998.

10. If a person make himself responsible to the vendor for a purchase, upon an agreement with the purchaser, that if any profit arise from the sale, he shall have one-half for his trouble; this does not constitute a partnership between the parties. 4 East, 144.

11. An agent paid out of the profits of an adventure, is not therefore a partner in the goods. 5 Taunt. 74.

12. The consignment of a bag of dollars to A., with directions to pay over a certain number to B., creates no joint-tenancy between them. 4 Taunt. 24.

13. *Partnership contracts*. — A bond is given to one of several partners as a security for money to be advanced by the firm. Held, that the money advanced might be set off in taking the general account. — *Note*, the obligor had become bankrupt. — *Quære*, if the bond was not considered as a collateral security. 1 M. & S. 545.

14. A covenant in a deed of partnership, in case of dissolution, to refer all matters relating thereto to arbitration, does not include the question whether the consideration given by one partner to the other, on entering into partnership, should be refunded. 2 B. & P. 131.

15. On the question, whether articles were ordered by the firm, acts subsequent to the delivery are admissible evidence against the firm. 4 T. R. 720.

16. *Partnership property*. — Where the partner in England refuses to appear for those abroad, the court will not relieve against a distress to compel appearance, though the partnership property taken was paid for with his own funds. 3 B. & P. 254.

17. If on an execution against one of two partners, the partnership effects are taken and sold, the court will order the sheriff to pay over the other a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. Dougl. 650.

18. If a *fi. fa.* issue against one of several partners, the court will not, upon the application of partnership creditors, either refer it to the officer to ascertain the interest of the defendant in the property seized, or (*c. s.*) give time to the sheriff to make his return, so as to enable them to obtain an account in equity. The proper time for the sheriff to pursue, is to put some person in possession as vendee, and to leave him and the parties interested, to contest the matters in equity. 3 B. & P. 288.

19. Upon an extent against one partner, the crown can only take the separate interest of the partner, and that liable to the partnership debt. Wightw. 50.

20. The court will not grant an *amoveas manus* to remove the king's hands from partnership property, seized under an extent against one of the firm, in the first instance. The course is, to apply for a reference to the deputy-remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained by consent, on giving security. 2 Price, 198.

21. *Individuality of*. — The indorsement of a bill or note, by one of several partners, in the partnership name, though without the consent or knowledge, and in fraud of the others, will be binding on the partnership as between them and an innocent holder. 3 Smith, 199. 7 East, 210.

22. A debt due to two jointly may be discharged by one alone. 4 T. R. 519.

23. Satisfaction of a bill or note as to one of several partners, is a satisfaction as to all; and, consequently, where a person is a partner in two firms, a bill or note, which is satisfied as to one firm, is satisfied as to both: and this, though the one common partner be, in fact, ignorant of such bills or notes having been so satisfied. 12 East, 317.

24. The act of one partner, as such, is that of the firm; if, therefore, a contract be concluded in foreign parts, by one partner, the remaining partners being resident in England, so far as the interests of this country are concerned, it is considered as made in England. 3 T. R. 454.

25. *Act of one binds the firm*. — The implied authority of one partner to bind the firm, is confined to cases of simple contracts. He cannot bind it by deed, the privilege not being usually given by partners to one another. 7 T. R. 207. 10 East, 418.

26. Where one party has given due notice that he will not be bound by his companion's engagements, he is safe. 10 East, 264.

27. One partner cannot bind the firm, if the creditor, when he trusted him, knew that he was acting without authority. 1 East, 48. 52.

28. If

28. If, when the creditor trusted the partner, he had reason to suspect that he was acting without authority, the firm is not answerable. 10 East, 264.

29. If a separate creditor of a member of a firm, receive in payment from his debtor an accepted bill, drawn eighteen days before its delivery to the creditors, and payable forty days after date, for a sum exceeding the debt, and it does not appear that the creditor knew that the bill was indorsed by his debtor in the partnership firm, or that such payment was unknown to, or unauthorized by, the other partner, and where evidence to this effect might be adduced, the creditor is entitled to recover payment from the acceptor. 13 East, 175.

30. A private agreement for a consideration, moving to himself, by one of several carriers in partnership, to carry a customer's goods free, will not bind the firm, who may, therefore, insist upon a non-compliance with the common notice in defence of an action for negligence. 1 M. & S. 255.

31. *Responsibility of each for the other.* — If two are partners as attorneys and conveyancers, and one receive money to be laid out on mortgage, the other is liable for the amount, though the partner give a separate receipt for it. Cowp. 314.

32. *Liabilities of partners on negotiable instruments.* — If a partnership are not bound on the face of a bill or note, evidence to oblige them by it, as proof that the demand for which it was given was due from all, will not be admitted. 3 Camp. 493.

33. If a bill drawn by one member of a firm, be remitted to their agent, who is in the habit of receiving bills from his employers, some drawn in the name of the firm, and some by the separate members of the firm, and the bill so remitted be taken by the agent to the bankers, who discounts it, upon the supposition that it is drawn on the partnership account, and the proceeds of the bill are remitted by the agent to the partnership account, and the discount allowed to him in his account with the partnership; an action cannot be maintained by the banker against the firm, either upon the bill or upon the general assumpsit. 15 East, 7.

34. *Liability from adoption.* — A partner, not originally liable, cannot be charged by afterwards acknowledging himself responsible, or accepting bills drawn on the firm for the credit. 4 T. R. 720.

35. *Fraudulent transactions.* — Where one of two partners sells partnership property, without his companion's authority, and receives the price, the purchaser may, on discovering the fraud, sue the vendor for money had and received. 4 M. & S. 475.

36. *Suits.* — Partners should join in an action for slander in the way of their trade. 3 B. & P. 150.

37. Where a banking trade was carried on in name of father and son, held, that the father, by proving that the son had no property in the banking fund, might sue alone for money overdrawn by a customer, but not otherwise. 14 East, 210.

38. One of two partners, without his companion's authority, sells partnership property, draws a bill upon the purchaser for the price, in name of the firm, and receives payment when due, which he applies to his own use. The property is not delivered to the purchaser, who, therefore, becomes entitled to recover back his money. Held, that he might recover it against the partner receiving it alone, without joining his companion. 4 M. & S. 475.

39. A surviving partner defendant must be sued as such, or the plaintiff will be non-suited. 6 T. R. 363. 2 M. & S. 25.

40. The separate property of one partner who appears, is not distrainable to compel an appearance by the other. 4 Taunt. 299.

41. If on striking a balance, a sum be found due from one partner to the other, the latter may sue the former. 2 T. R. 478. 473.

42. One partner may sue the other for money received to his separate use, since there is no community of interest therein. 2 T. R. 476.

43. An action may be maintained by one partner against another, for the non-performance of an agreement as to the capital to be advanced for the formation of the partnership. 13 East, 7.

44. If two persons agree to share in profit or loss upon goods bought by one of them, upon their joint account, an action may be maintained by one against the other, for the payment of his share. 13 East, 7.

45. *Dormant partner.* — Where a copartner contracts avowedly in his individual capacity, though tacitly for his companions also, they cannot be joined as co-plaintiffs, for non-performance of the contract. 1 M. & S. 249. 2 Taunt. 324, 325.

46. A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action. 1 Mars. 246. 5 Taunt. 609. Denied by Lord Ellenborough.

47. *Survivorship.* — On the death of one partner, the legal right to money due to the

the partnership wholly survives to the other. If, therefore, it be paid over by the debtor to a third person, the surviving partner may sue the payee for money had and received without declaring as survivor. 2 T. R. 476.

48. *Set-off*. — A defendant may set off a debt due to him as surviving partner, against a demand in his own right. 5 T. R. 493.

49. Since a debt due to the plaintiff as surviving partner, is due from himself alone, it may be set off against a demand in his sole right. 6 T. R. 582.

50. *Dissolution*. — After the dissolution of a partnership by agreement, one of the persons who composed the firm cannot put the partnership name on any negotiable security, notwithstanding such partner may have had authority to settle the partnership affairs. Nor can any equity arise against them out of the transaction. 1 H. B. 155.

51. Notwithstanding a dissolution of partnership, the authority of each partner to bind the firm by his admissions, in matters which originated during the partnership, is the same as before. 1 Taunt. 104.

52. On a dissolution of partnership between A. and B., an assignment of the effects to A. and the taking upon himself payment of the debts, does not discharge B.'s liability for money formerly held by A. as trustee for C., and applied by him, with B.'s consent, in the partnership trade. 5 T. R. 601.

53. *Miscellaneous*. — One of several partners in a contract, receiving goods from another partner, for the purpose of performing the contract, cannot pledge them to pay a debt from that other to himself. 4 Taunt. 684.

54. *SECONDLY, IN EQUITY*. — *Who are partners*. — A testator entitled by leases of unequal duration to iron mines and works, by will gave a pecuniary legacy to B., "as a capital for him to become a partner with my executor, of one-fourth share in the trade of all those works as long as the lease endures;" and gave all the residue of his real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. three-eighths of the concern at this iron work, and of the premises at C.; "so the partnership will stand at my demise, C. three-eighths, H. three-eighths, B. two-eighths." C., H., and B., jointly carried on the works for two years after the testator's death, selling iron manufactured by them not only from ore procured from the testator's mines, but from ore and old wrought iron which they purchased, but not merely for the purpose of mixing with the produce of the testator's mines for improving the iron. C., at the end of the two years, purchased B.'s share, and the business was carried on in the same manner by C. and H. till H. died. There was no written or other agreement for the duration of the partnership. Held, that this was not a mere joint interest in the produce of land, but a trading partnership; that it was dissolved by the death of H., and that the fact of C. and H. having purchased and taken assignments to a trustee for themselves, of some of the rents reserved by the leases, did not furnish any inference of an agreement to continue the partnership for any definite period; and a sale of the property was ordered on motion. *Scoble*, too, that this was a trading within the bankrupt laws. 1 W. C. C. 181.

55. *Distinction as to partners with reference to third persons, and as between themselves*. — Partner as to third persons by a specific interest in the profits, as such; not by receiving a sum of money, even in proportion to a given share of the profits. 17 Ves. jun. 403.

56. Partnership by agreement for a participation in profits or their application. 18 Ves. 300.

57. Partner, without participation of profit, by lending his name, though contracting that he shall suffer no loss. 18 Ves. jun. 301.

58. Partner by a share in profits without interest in capital. 19 Ves. 291.

59. Partnership by a public declaration in an advertisement of dissolution. 3 Ves. & Beam. 125.

60. *What associations are legal*. — As to the legality of a partnership of 1600 shares, (see statute 6 Geo. 1. c. 18. s. 18.) and, if legal, the capacity of some to sue for a dissolution on behalf of the rest, and as to the necessity of an offer of contribution to losses, &c. *Quære*. 1 Ves. & Beam. 154.

61. *Influence of the lex mercatoria upon partnerships*. — The common law only partially adopts the *lex mercatoria* in respect of partnerships in trade, holding that there is no survivorship in respect of interest in such partnership, but that in respect of partnership contracts, the obligation is joint, and attaches exclusively on the survivors. Relief in equity upon joint bonds given on the ground of mistake. 1 Mer. 563.

62. *Duration of partnerships*. — A testator entitled by leases of unequal duration to iron mines and works, by will gave a pecuniary legacy to B. "as a capital for him to become a partner with my executor, of one fourth share in the trade of all those works, as long as the lease endures;" and gave all the residue of his real and personal estates to H. and his wife, and appointed H. executor. By a codicil he gave to C. three-eighths of the concern at this iron-work and of the premises at C.; "so the partnership

nership will stand at my demise, C. three-eighths, H. three-eighths, B. two-eighths." Held that this did not create a partnership co-extensive with the duration of the leases. 1 W. C. C. 181.

63. *Construction of articles.* F. on entering into articles of partnership with B. paid a premium; F. dies. After his death, B. sold the good-will of the trade. Held, on the construction of the articles, that the representative of F. was not entitled to a share of the money, for which such good-will was sold. 3 Mad. 74.

64. *Waiver of articles.* — The conduct of the parties in a partnership may supersede the stipulations of the articles, and raise a presumption of assent to a different agreement, and an approbation of a mode of dealing with the partnership funds, from their knowledge of and acquiescence in it. 1 Rose, 437.

65. Where articles of partnership contained a clause, providing for the settlement of the partnership accounts, annually, upon a certain day; and that upon the death of a partner his share should be taken and paid for, by the survivors, according to the account next before his death; but the parties had for several years omitted to settle the accounts annually, and had engaged in adventures rendering it difficult that they should do so. — Held, that the clause relative to the annual settlement of accounts was to be considered as waived, and that a deceased partner's share was liable to losses happening after his death, on adventures previously existing and unclosed; and an injunction was granted against proceeding at law against the surviving partners, on a bond given to the executors of the deceased partner before the accounts were taken. 1 W. C. C. 297.

66. *Duties and obligations of partners inter se.* — Implied obligations among partners as far as they are not regulated by express contract: for instance, to use the joint property for the benefit of all the owners. 15 Ves. 226.

67. Obligation of a partner to apply property, as received, to partnership purposes, or to charge himself as debtor in the partnership books. 3 Ves. & Beam. 36.

68. *Quære*, whether one of two partners, who has retired from an active concern in the business, can be compelled to look into the partnership accounts, to state the result of them as to particular transactions, which the acting partner had transacted, and given an account of by his answer. 2 Mad. 176.

69. *Agreements between, obligatory upon creditors.* — One partner may agree with a retiring partner, to give him a sum for the concern, though they know the partnership to be insolvent, provided no fraud on creditors was intended. 1 Mad. 346.

70. *Authority of one partner to act for or bind his companions.* — Firm bound by an instrument executed by one in the presence of the others. 3 Ves. 578.

71. To make a partnership liable to a demand in respect of a separate transaction, an agreement must appear. 6 Ves. 602.

72. Power of a partner to bind the partnership; unless from the nature of the transaction it can be inferred to be separate; in which case previous authority, or subsequent approbation must be shewn. Under the circumstances, proof in bankruptcy undisputed since 1793, and no one to explain the transaction, but one partner, inquiry refused. 8 Ves. 540.

73. Payment to one partner a good discharge. 15 Ves. 213.

74. Partnership bound by the signature of one partner. 15 Ves. 286.

75. One partner acts for all almost universally in bankruptcy. 19 Ves. 293.

76. In general, a partnership is bound by the acts of an individual partner, in such cases only as in the usual course of dealing are referrible to the partnership concerns. 2 Cox, 312.

77. Order for goods by two partners, afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one, who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. 1 Mad. 583.

78. *Equity of partners inter se.* — Equity among partners; and the consequences upon a dissolution, with reference to each other and creditors. 11 Ves. 5.

79. *One shall be relieved against the other.* — No relief upon a bill by one partner against another, not praying a dissolution. 2 Ves. & Beam. 329.

80. *Of transferring the management of the concern to the master or trustees, or appointing a receiver.* — Receiver appointed of partnership stock in the brewing trade. Dick. 114.

81. In a cause for an account for copartnership, both parties being dead, a receiver shall be appointed; *secus*, in the case of a surviving partner. 2 B. C. C. 272.

82. Court sometimes takes the management of a brewery out of the hands of the parties. 1 Ves. 130.

83. The principle upon which a court of equity interferes between partners by appointing a manager, receiver, &c. is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce; not to carry it on. The Court



Court therefore would not upon motion appoint a manager, &c. of the Opera House, except upon the principle, applicable to any other partnership, as necessary to the relief, a foreclosure; taking into consideration also the difficulties from the nature of the subject and the contract, an anxious provision for arbitration, and that one party was by the express contract manager. 15 Ves. 10.

84. Receiver not ordered merely on a dissolution of partnership, ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. 18 Ves. 281.

85. Motion for a receiver on a mining concern refused upon a claim of partnership in the equitable interest, not raised, until the concern at a great expense became prosperous, and denied by the answer. 19 Ves. 144.

86. The Court will not appoint a receiver of the effects of a subsisting partnership trade, unless on the grossest abuses of some of the partners. 2 Anst. 453.

87. The Court will not treat a bill to restrain an acting partner from collecting or creating debts, and appointing a receiver, as if it were in nature of a bill to restrain waste, whatever they might do were such partner shewn to have been guilty of culpable conduct, or to be insolvent. Nor will they permit the plaintiff, in aid of such a motion, to use an affidavit made and filed after the coming in of defendant's answer: though in a case analogous with that of irreparable waste, such an affidavit made and filed before answer, may be used. 1 Price, 303.

88. *Partnership property*. — Ships purchased by one partner held separate property as between the creditors after his bankruptcy and the death of the other, upon the circumstances; particularly the registry being made in the name of the one partner only; and being afterwards continued for a purpose, that would have prevented any claim of the other; viz. a fraud upon an act of parliament. 6 Ves. 739.

89. A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bankruptcy.

As far as the profits may have been produced by a joint application of that and other funds. — *Quære*. 15 Ves. 218.

90. Partner, after the dissolution of the partnership, continuing to trade with the joint property, must account for the profits. 17 Ves. 298.

91. Lease of premises where a partnership trade was carried on, renewed by one partner in his own name clandestinely; a trust for the partnership; to be accounted for as joint property. 17 Ves. 298.

92. *Nature of real estate varied by partnership agreement*. — Though a copartnership agreement may alter the nature of real estate, it must be express, so to do. 3 B. C. C. 199.

93. Purchase by partners of real estate to them and their respective heirs, equally, as tenants in common, &c. to be used in trade during the partnership; with covenants against alienation and partition. The nature of the property is not varied. 9 Ves. 500.

94. *Partnership items*. — A joint creditor taking a security from one partner on account, but which is not paid, does not render the debt a separate debt. Cooper, 99.

95. *Dissolution of partnership*. — Bill by partner under a parol agreement charging misconduct in the other partner, and praying a dissolution, account, and injunction from executing securities in the name of the firm; demurrer to the prayer for a dissolution, because there was no writing between them, over-ruled. 3 Ves. 75.

96. Partnership may, after the determination of it by the contract of the partners continuing for the purpose of winding up engagements with third persons. 15 Ves. 226.

97. Partnership without any provision as to its duration may be determined without previous notice; subject to the accounts to wind up the concern. 16 Ves. 49.

98. The consequence of the dissolution of partnership, where there are no articles prescribing the terms, is a general sale and account of the joint property; one or more partners therefore cannot insist on taking the share of another at a valuation; or that he shall remove his proportion from the premises; thereby securing the good-will. 17 Ves. 298.

99. A partnership without articles and for an indefinite period, may be dissolved by any partner, at any time, without previous notice; subject to the engagements of the partnership; but the existence of engagements with third persons, cannot prevent the right of dissolution, as amongst themselves. 17 Ves. 298.

100. If a partner is so far disordered in his mind as to be incapable of conducting the business according to the terms of the articles of copartnership, a court of equity will dissolve the partnership. 1 Cox, 107.

101. The Court will dissolve a partnership, where it appears, that the business cannot

cannot be carried on according to the true intent and meaning of the articles of copartnership, although one partner objects to the dissolution. 1 Cox, 213.

102. Partnership in the Opera-house, dissolved by the conduct of the parties, making it impossible to carry it on upon the terms stipulated. 2 Ves. & Beam. 299. Decree accordingly for a sale of the whole concern, restraining the managing partner from acting; with liberty to either party to lay proposals before the master for the management until the sale. 2 Ves. & Beam. 299.

Dissolution of partnership on the lunacy of a partner, if to be obtained, only by decree, not by the act of the survivors: not determined where they had carried on the business with his capital. 2 Ves. & Beam. 303.

103. How far the lunacy of a partner is a ground of dissolution, depending upon the degree and probable duration of the disorder, affecting the capacity to fulfil his contract — *Quære*. 2 Ves. & Beam. 303.

104. The death of a partner of itself works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable to the debts of the continuing partners. *Secus*, if one of the surviving partners is an executor of the deceased. 3 Mer. 614.

105. A partnership for a term of years is dissolved by the death of a partner before the term has expired. 3 Mad. 251.

106. If a retiring partner assign all his share in the concern to two of the continuing partners, upon trust to pay him an annuity for his life, subject to abatement or enlargement with the fluctuation of the profits of the trade, that will not with reference to creditors determine the partnership. 1 Buck. 48.

107. A retiring partner assigns all his share in the concern to two of the continuing partners, upon trust for his infant children, in such shares as he should appoint; and in default of appointment, upon trust for the children, to be divided amongst them, when the youngest shall attain to 21. Held that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under 21, was such an interest reserved by him in the concern as, with reference to creditors, prevented the determination of the partnership. 1 Buck. 48.

108. *Liability of retired partner*. — A general devise in trust for the testator's widow and children having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership on the retirement of one partner, who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestuys que trust*; continuing to make remittances on that account from the funds of the new partnership: the partner, who retired, is not discharged. 4 Ves. 36.

109. *Liability of the assets of a deceased partner*. — Bankers upon a deposit of money with them gave notes bearing interest; the partnership was dissolved: one of the partners soon afterwards died, and his creditors were called by advertisement: another partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit-notes for near two years, when they failed: the assets of the deceased partner are not discharged. 3 Ves. 277.

110. A joint creditor by simple contract may go against the assets of a deceased partner; but cannot before the account retain separate property of that partner in his possession. 3 Ves. 566.

111. On the death of a partner in a banking-house, the surviving partners carry on the business without changing the firm, and afterwards become bankrupt. The equities of the several classes of creditors of the partnership against the estate of the deceased partner, with reference to the alleged solvency of the house at his death, to the effect of subsequent dealings and transactions with the survivors, and of notice expressed or implied, and to the custom of bankers declared upon exceptions to the report of the master, distinguishing the classes of creditors according to the different nature of the circumstances. 1 Mer. 530.

112. Equity of a creditor against the estate of a deceased partner not barred by eight months' non-claim and payment in part by the surviving partner. 1 Mer. 566.

113. No difference in principle between the case of a banking-house and any other partnership as to the equity of the creditor against the deceased partner's estate. Money paid into a banker's, constitutes a debt, not a deposit. A creditor's leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as relinquishment of the old security. 1 Mer. 568.

114. No rule of convenience fixing any period within which a creditor of a banking-house not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner. 1 Mer. 569.

115. Notice of the death of the deceased partner, whether before or after the creditor

ditor has received payment in part from the surviving partners, not material. The creditor, by drawing on the surviving partners, recognizes them as his debtors, but not exclusively. 1 Mer. 570.

116. Notice to the surviving partners given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant, payments subsequently made in respect of cash balances, not to be taken as operating in extinction of such a debt. 1 Mer. 579.

117. Creditors in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the use of partnership, entitled as against the estate of the deceased partner, either to consider it as a debt or to have the stock replaced, at their option. It makes no difference that the stock stood in the name of, and was sold by one of the partners only, the proceeds having been applied to the partnership use. 1 Mer. 611.

118. Deposit of bills with a banking-house in the life-time of D. (a partner since deceased), which were sold by the house, part in D.'s life-time, and part after his death. Held, the estate of D. is not answerable in respect of the latter, though the party depositing had no notice of the death of D. 1 Mer. 616.

119. *Survivorship*. — The good-will of a trade carried on in partnership without articles survives; and is not partnership stock. Profits accrued after the death of one partner are joint property. 5 Ves. 539.

120. Whether upon the death of a partner the good-will survives — *Quære*. 15 Ves. 227.

121. Partnership determined by death: the legal property survives; not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained, not by calculation, but by sale. 15 Ves. 227.

122. Surviving partner being executor, not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death. 1 Ves. & Beam. 170.

123. Allowed expences actually incurred under an erroneous conception, that he was sole proprietor by purchase from his co-executors; set aside as a breach of trust; though *bonâ fide*. 1 Ves. & Beam. 170.

124. Under the usual decree for an account on a bill by creditors, the master refused to proceed upon the claim of the surviving partners of the testator, in respect of a debt allowed to be due to them, on the balance of certain dealings, between the partnership and the testator in his separate capacity; but on motion to be admitted to go in before the master, and prove this debt under the decree, it was referred to the master to take the account. 3 Mer. 297.

125. *Semble*, on a partnership between professional persons, the good-will of a business, on the death of one, survives. 3 Mad. 74.

126. *Accounting*. — Account directed four years after dissolution, circumstances shewing that the partner retired from a conviction that the partnership was insolvent. 4 B. C. C. 423.

127. Partnership without any stipulation as to the proportions; the partners entitled in equal moieties. 16 Ves. 49.

128. The court cannot make any allowance to one partner for the expence of entertaining the customers. The accounts having been annually balanced without such an *item* is conclusive. 1 Anst. 94.

129. *Execution against, and lien upon joint property*. — Judgment against one of two partners: Execution to be only of a moiety; but in equity upon the failure of one, the partnership fund is to be distributed among the joint creditors. 1 Ves. 240.

130. A separate creditor of a partner has no right against the joint property farther than the separate interest of that partner; viz. his share upon a division of the surplus, subject to the accounts of the partnership; therefore joint property of an insolvent partnership taken in execution for a separate debt cannot be held against the joint creditors. 4 Ves. 396.

131. Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest, subject to an account between the partnership and the partner, and therefore to the joint debts: assignee under a separate commission of bankruptcy has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. 4 Ves. 397.

132. Execution under a judgment by a separate creditor as to a moiety: whether in equity subject to the partnership account — *Quære*. 11 Ves. 85.

133. Assignment by one partner of joint property to secure his separate debt, must be subject to the joint debts. 15 Ves. 557.

[And therefore it cannot be proved by witness. 3 B. M. 1663.]

*Per legem mercatoriam*, the merchandizes, debts, and duties of joint-merchants do not survive, but go to the executor of him who dies; for *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. Co. L. 182. a.

And this extends to all merchants and traders, though they do not go beyond sea. 2 Brownl. 99.

And therefore, the executor of the deceased shall join with the surviving merchant for goods carried away in the lifetime of the testator. Lut. 1493. Dub. whether necessary. Sho. 189. Cont. for the remedy survives, though the duty does not survive. Sal. 444.

[If judgment is obtained against a surviving partner for a partnership debt, it is still a partnership debt. 1 Vesey, 265.]

And if a joint-factor dies, an account lies against the executor of the deceased, and the survivor. Ca. Cha. 127.

Yet the survivor of joint-factors may be charged solely for goods sold by him and his partner. R. Ca. Ch. 127.

So, if a joint-merchant die, the action for money due to them survives; for the survivor and the executor of the deceased cannot join. Sal. 444.

[Articles of partnership in trade do not subsist for the benefit of executors (to entitle them to continue in the partnership) unless specially provided. 2 Vesey, 33.]

[In a cause for an account of a copartnership, both parties being dead, a receiver shall be appointed; otherwise in the case of a surviving partner. 2 Brownl. 272.]

## (E 1.) Contracts of Merchants.

Contracts of merchants are regal, notarial, or verbal. Ma. 89.

The regal are, where the king by commissioners, contracts with any

134. Execution by a separate creditor against joint property; subject to account, ascertaining the specific interest of the partner in the joint effects. 17 Ves. 407.

135. Execution against joint property; though the foundation of the action had no relation to the joint concern. 17 Ves. 413.

136. Execution at law under judgment against a partner, *formerly* by seizing the joint effects, and selling the undivided share; *now* by selling the actual interest; how to be ascertained except in a court of equity — *Quere.* 2 Ves. & Beam. 301.

137. *Proof of partnership.* — A partnership cannot be established by the evidence of the partners and their private communications. The fact must be proved *aliunde*. For want of such proof a commission against the ostensible partners was sustained. 5 Ves. 424.

138. *Agreements between, varied by parol evidence.* — On one of two partners retiring from trade, it was left to arbitrators, to determine, (amongst other things,) what was to be paid to the retiring partner for the good-will of the trade; and they, on an understanding that the retiring partner would not set up the trade in the same street or its vicinity, awarded 500*l.*, as the share of the retiring partner, for the good-will, which was paid; but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence, of the understanding upon which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street or its vicinity. 2 Mad. 198.

139. *The meaning of the term "good-will" ascertained.* — Good-will of a trade in two distinct senses, as between a continuing and a withdrawing partner; one as it necessarily arises out of, and is connected with, ownership; the other where it is made matter of contract, as not to carry on the same trade, or not within a certain distance, &c. 3 Mer. 452.

particular merchants for provisions, apparel, &c. of the army, &c. Ibid.

Notarial contracts are, where an entry of the contract is made by a public notary. Ma. 90.

(E 2.) Contract by Charter-party. — (E 2. a.) How made.

Contract by charter-party is, when there are agreements or covenants by charter between one or more merchants, and the master or owners of a ship, for the freight of his ship and the safe carriage of the merchandizes. Ma. 97.

No ship ought to be freighted without a charter-party. Ibid. (j)

(E 3. a.) What the merchant ought to do. Freight of the ship.

The merchant ought to import his goods in the ship, and pay the freight according to the agreements by the charter-party. Ma. 98. 99.

The usual freight is so much per ton. Ma. 99.

Or, so much for the voyage outward, and so much inward, or so much for the whole. Ma. 98. 100.

If no sum is expressed for the freight, so much ought to be paid as is usual in such voyage. Ma. 100.

So, if the freight be agreed for such goods, and the merchant puts more in the ship, the master shall take as much freight as he pleases. Ma. 99.

If the freight be agreed for 3*l.* per ton, and afterwards there is an embargo upon the ship for six weeks, the master may make a new agreement with the merchant's factor for 6*l.* a ton, without discovering the former agreement. R. 2 Ver. 242.

If the freight be in gross, *viz.* 600*l.* for a ship of 200 tons, it shall be paid, though the ship has not so many tons. Ma. 100.

If the ship be freighted, so much outward and so much inward, the outward freight shall be paid, though the ship perish in her return. Ma. 98.

Or, return without lading, by the default of the merchant or his factor, the whole shall be paid. Semb. 2 Ca. Ch. 75. 2 Ver. 212.

So, though by the letter of the charter-party the freight cannot be recovered by law, yet, if by the intent it ought to be paid, it shall be recovered in equity. 2 Ver. 210. [Dougl. 272.]

(j) (E 2. b.) *How construed.* — Exceptions in the master's covenant to receive a cargo, are not to be incorporated by implication in that of the freighter to provide one. 16 East, 201.

2. Where the charter-party stipulated for delivery at X., Y., or Z., &c. but Y. was omitted in the bills of lading; held, that such omission only relieved the master from the duty of going to Y., if disinclined, but did not take from him the power of so doing. 13 East, 565.

3. The master covenanted to proceed to X., and there apply to the freighter's, for orders where to proceed and deliver the cargo; when he would proceed there, and deliver to the freighter's agents, agreeably to bills of lading. The bills of lading were for delivery to the freighter's agent at X., or his assigns. A delivery at Y., as directed by the agent at X., to one B., averred to be the freighter's agent in that behalf, was held sufficient to entitle to freight under the charter-party. 13 East, 565.

But

But if the ship perish, the whole freight from the last place or time of payment will be lost. 1 Sid. 236. [Doug. 541.]

So, if there be a default in the master, he shall lose his freight; as, if the matter sail out of port in a tempest, &c. Ma. 98. 102. Vide post, (E 6. 9.)

Or, without a pilot, or necessities, or contrary to the terms required by the charter-party. Ma. 98. 102.

So, if the ship returns without lading, where he does not stay for it the whole time agreed, and makes a protest against the factor, &c. Ma. 98.

Though there was danger of being taken by the enemy, if he had stayed. Ma. *ibid*.

And if no freight was payable till the return, he shall lose the freight outward as well as inward. *Ibid*.

The goods carried, generally, are a security for the freight. [Doug. 104.]

And the master need not deliver them without payment. (*k*)

(*k*) 1. A delivery of the entire number of packages, however the contents may be damaged by negligence, is "a right and true delivery of the cargo agreeably to the bills of lading," so as to entitle to the freight. 12 East, 381. 6 Taunt. 65.

2. Where by the terms of the charter-party an abatement in the freight is to be made in case of the inability of the ship to proceed, &c. an inability arising from the want of hands, though without the master's default, is within the provision. 3 East, 235.

3. Where a gross sum is to be paid by the freighter, in case ship is compelled to return without having discharged the outward cargo, the whole is payable, notwithstanding homeward freight is earned by the master on his own account. 2 Taunt. 285. 12 East, 496.

4. A charter-party provided that the freighter "should pay unto the master, for the freight and hire of the vessel, on the said voyage from L. to M., 120*l*.; and from M. and L. at and after the rate of 2*½**d*. per pound weight, &c.; such freight to be paid as follows, viz. 120*l*. for freight of the outward cargo to M., and as much cash as may be found necessary for the vessel's disbursements in M. to be advanced when required, free from interest and commission; and the residue of such freight to be paid on the delivery of the cargo in L." Held, that the cash to be advanced for the ship's expenses at M. was not to be considered as a loan, but as a part payment of the homeward freight. For, amongst other reasons, the advance being to be made "free from interest and commission," shews that it was not meant to be a loan, for then interest and commission would have been charged. 4 M. & S. 37.

5. Where, in the case of a chartered vessel, the bill of lading expresses, that the goods were shipped by order of A., deliverable to his order, paying freight as per charter-party; and by the charter-party the master agrees to receive a cargo from the agents or assigns of the freighter, the inference is, that A. is only an agent. 2 N. R. 411.

6. As between ship-owner and freighter, the right to freight does not commence until the ship has broken ground in the course of her voyage. 2 H. B. 654.

7. Where freight is reserved monthly, to be paid in proportions, at the expiration of two, six, ten, and fourteen months, (e. gr.) it is earned at the end of each month, and the payment only postponed. 10 East, 555.

8. Freight, as between British subjects, is due, the charter-party containing an exception of restraint of princes, where the master is prevented bringing home the intended cargo, by the embargo of a foreign state. 3 B. & P. 295.

9. If a consignee accepts goods, he cannot defend himself from the payment of freight, on the ground that they are damaged on the voyage. 6 Taunt. 65. 12 East, 381.

10. Where by a charter-party the freight is payable on arrival at the port of delivery, an acceptance by the consignee elsewhere, though it vests no right under the charter-party, raises an implied contract to pay a compensation in nature of freight. 1 Taunt. 300. 7 T. R. 381.

11. Where a ship is chartered outwards only, without reference to her return, and a delivery of the cargo is prevented by one of the perils expressly, or by impli-

action excepted against; so, that freight is due from the owner for bringing it back. 1 Taunt. 300.

12. Freight *pro rata itineris*, is not recoverable, unless the completion of the voyage is prevented by the freighter's own act, or unless under a new contract. 7 T. R. 381.

13. Where by a charter-party freight is payable at so much per —, on delivery of the cargo, and the delivery of part is prevented by act of the consignee, or by one of the perils excepted against, freight is due for the part delivered. 1 Taunt. 300.

14. Where freight is payable on delivery of the cargo at the port of discharge, no implied contract to pay freight *pro rata*, arises from the vessel being ordered back by our government. 10 East, 526.

15. Whatever right to freight *pro rata itineris*, may arise on a capture, it cannot be enforced pending the suit in the admiralty for a condemnation. 5 East, 316 1 Smith, 477.

16. The vendee to whom a chartered ship is sold before the voyage, not the vendor, or one to whom he afterwards assigns the charter-party, is entitled to the freight. 2 Taunt. 407.

17. The owner with whom a covenant to pay freight has been made will be entitled to the freight, not the vendee where she has been sold during the voyage. 10 East, 279.

18. A mortgagee who does not take possession, is not entitled to freight. 1 H. B. 117.

19. The master, by signing a bill of lading containing the usual clause, "to deliver the goods to the consignee or his assigns, he or they paying freight for the same," coupled with his delivery, without first exacting freight, does not relinquish his right to demand it from the consignor or charterer. 1 Taunt. 300. 13 East, 565.

20. The master, by taking an indorsement on the charter-party, requesting the consignee to pay freight, (in point of fact, certain demurrage incurred before departure), and omitting to give notice of non-payment, does not discharge the consignor. 1 Taunt. 300.

21. A carrier by taking a bill of exchange from the consignee, drawn upon the consignor, but which he refuses to accept, does not forego his remedy against the consignor. 8 T. R. 451.

22. Three partners, A., B., and C., order goods from abroad, and then dissolve partnership, and make over their property to trustees, for their creditors, leaving A. and B. as agents to settle the affairs of the firm. The goods arrive and are delivered to A. and B. In an action against A. and B. and C. for the freight, held that C. was not liable. 1 Mars. 248. 5 Taunt. 612.

23. Where no express agreement has been made by the shipper for freight, the consignee becomes liable for it by accepting the goods under the bill of lading. 13 East, 599.

24. If, by a bill of lading, goods are made deliverable to A. or his assigns, he or they paying freight for the same, and A. assigns the bill of lading to B., and B. assigns it to C., who accepts the goods under it, C. is liable for the freight. 13 East, 599.

25. The indorsee of a bill of lading, which directs the goods to be delivered to order, or to assigns paying freight, is liable for the freight, though he be only acting as broker for the consignee; and though twelve months have elapsed since the landing of the goods, without any demand of freight, he is bound not to deliver the goods until he knows that freight has been paid. 1 Mars. 146. 5 Taunt. 477.

26. Though, generally speaking, any one, notwithstanding another may be consignee or indorsee of the bill of lading, who accepts goods on his own account, is chargeable with their freight; yet where he declares that he is acting as agent only for another, he is not charged by acceptance. 1 East, 507.

27. The receipt of goods by order from the consignee, (under a bill of lading, and in whose name they had been landed,) raises no implied assumption in the party receiving, to pay the freight, though coupled with the fact of his having entered them in his own name at the custom-house; *secus*, where it is shewn that his former course of dealing was to pay freight under such circumstances. 1 M. & S. 157.

28. Where an express contract, a charter-party under seal for instance, subsists between the master, or owner, and the consignor; then if the sum payable by it is freight, the consignee becomes liable, merely by accepting the goods under a bill of lading, which makes them deliverable on payment of freight as per charter-party. 5 Taunt. 477. 1 Mars. 146. If no freight, but a compensation in its stead, a bare acceptance, without more, will not charge him. 2 M. & S. 305.

29. The last case, however, seems to warrant the following position:—The law will not raise an implied promise where there is an express agreement between the parties,

[ (E 3. b.) Demurage. ] (l)

(E 4.) Contract of bottomree.

Bottommarie, bottomage, or bottomree, is so called, where the master takes up money, by way of loan, for the use of the ship, and pledges the bottom or keel of the ship for security of payment. Latch, 252. [1 T. R. 77.]

[If the owner of a ship charge her for repairs done in England, by

parties, either as against them, or those claiming under them, as assignees for instance, who, placed exactly in their shoes, have the same exemption with themselves. Therefore it seems, that if there is an express contract, a charter-party under seal for instance, providing for the payment of freight, an indorsee of the bill of lading, which makes the goods deliverable on payment of freight, does not charge himself to the payment, merely by accepting them under it. The ship-owner has already an express contract touching the freight, and there is no reason for supposing that he means to raise another; if it was his intention, the probabilities are, that he would have mentioned it. If he stipulate with the indorsee touching the freight, the indorsee will be bound to pay it, since there is a consideration sufficient; the captain waives his lien; or, if in law he has none, the parties perhaps have agreed to consider that he has, and so the indorsee has estopped himself. 2 M. & S. 303.

30. By the law of England, freight and wages strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to controul the general operation of the law, by their private agreement. They may, therefore, stipulate for payment of the freight in advance. 4 M. & S. 57. An agreement, that in consideration that A. would take on board his ship, B.'s goods, for the purpose of conveyance, B. would pay a certain sum on A.'s delivering to him the bills of lading, is a valid contract, and that the price of the carriage of the goods is recoverable immediately on the loading of them, whether the voyage be performed or not. 1 Mars. 122. 5 Taunt. 435.

31. The owners having stipulated for the freight, by an express contract, cannot be charged for it by bills of lading afterwards signed by the master. 10 East, 378.

32. There is no implied exception, in a covenant to pay freight, against payment during the time of making repairs, which the owner has stipulated to make, unless rendered necessary through his default. 10 East, 555.

33. The freighter covenanted to pay so much for extra men, part immediately, but not the residue till the ship's discharge, or return from her voyage. Held, that the ship's being burnt was a discharge within the clause. 10 East, 555.

34. A freighter who had the option to load wholly with cotton at a higher rate, or partly with rice at a lower rate, and partly with cotton; after election to load with cotton, and failing to furnish a complete cargo; is bound to pay the higher freight for the whole ship. 7 Taunt. 272. 1 Moore, 21.

(l) 1. By charter-party the freighter covenants with the owner to ship a cargo at Oporto, and to dispatch the ship, with the first convoy, for England, within fourteen working days after she is ready to receive her cargo. It is also agreed that the freighter may detain the ship for loading for fifteen running days after the fourteen, paying for the fifteen at a certain rate. The first convoy sails after the expiration of the fourteen days, and before the end of the fifteen. Held, that the covenant to sail with the first convoy is restricted by the agreement for the fifteen days, and, therefore, that the defendant is not liable to pay for the detention after the fifteen days. Mars. 276. 5 Taunt. 654.

2. The master is not entitled to the stipulated demurrage, if, before entering the port, he knew that an embargo was laid on the exportation of the commodity he is sent for. 3 B. & P. 295.

3. Necessary delay, occasioned by the crowded state of the London Docks, and from the goods being undermost, will not excuse the several freighters, where there has been no fault in the master, from paying the stipulated demurrage under each bill of lading. 3 Taunt. 387.

4. Any person taking goods under a bill of lading, makes himself liable to all its terms, and therefore to pay demurrage, if that be one. 4 Taunt. 52.

5. A ship-captain cannot sue on an implied assumpsit for demurrage. 4 Taunt. 1.



an instrument under seal, stated to be by way of bottomree, on which she was afterwards seized by admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ; nor can trover be maintained against the officer in possession by the warrant of the court of admiralty. 1 T. R. 649.]

And such hypothecation of the ship binds the owners. Latch. 252. Vide Admiralty, (E 10, 11.)

So, if a man makes a loan of money to be paid upon the return of the ship, and takes a security by obligation, &c. such contract is called a bottomree contract. Ma. 122.

[Where repairs are ordered by the underwriters, for the payment of which a bottomree bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which she is sold, they are liable for all the damage which shall accrue to the owner, in consequence of that refusal. 2 T. R. 407.]

And because the lender loses his money, if the ship does not return from the voyage, a great interest or premium is usually taken for it, and will not be usurious. Vide Usury, (B).

But, if a contract be made, by colour of bottomree, to evade the statute of usury, it will be usurious.

So, if the master or merchant takes a loan upon a bottomree contract, and deviates from the voyage agreed, he shall pay the money, though the ship never returns, but is lost before the time of payment agreed upon; for the deviation was the default of the master. R. Skin. 152.

#### (E 5.) What the master ought to do. — Provide the ship.

The master has the power over, and charge of the ship. Ma. 102.

And therefore, ought to take care that the ship and tackle be sufficient. Ma. 103.

And he shall answer for the damage which happens, if he pursues his voyage when the overloop of the ship is untight, or pump faulty. Ibid.

So, he shall answer for damage by bad hooks, ropes, blocks, &c. whereof he has notice. Ibid.

#### (E 6.) Perform his voyage.

So, the master ought to pursue his voyage with due care according to the instructions; and therefore, shall answer for damage which happens, if he hoist sail without a good pilot. Ma. 102.

Or, in tempestuous weather, without the advice of his company. Ma. 102. Vide ante, (E 3.) — Post, (E 9.)

#### (E 7.) The contract. How dissolved.

If a contract be not by charter-party, but only by earnest given, if the merchant recedes from the contract, he loses his earnest only. Ma. 98.

If the master recedes, he shall lose double the earnest. Ibid.

[In a charter-party, if A. covenants to proceed to W. to stay forty days, and load with the goods B.'s agents tender to be laden; and in consideration B. agrees to pay freight at 4*l.* 10*s.* per ton; proviso if the ship

ship does not arrive on 1st March, then to be at B.'s option to load at that freight, or the current freight, or not at all; and A. does not go to W., he is liable to the penalty. 3 B. M. 1637.]

(E S. a.) Remedy for non-performance.

If a contract by charter-party be broken, covenant lies upon it by the one party or the other. 3 Lev. 41. Lev. Ent. 37. [Dougl. 272.]

[The owner of the ship is liable to the freighter, for the default of the master, though the freight was to go to the master, either by special agreement of the owner, or by the custom of trade, and though it were in a trade unlawful in the foreign country, but lawful in England. B. R. H. 85. & 194.]

[But it must be charged on the custom of the realm, as in a ship usually carrying for hire, or employed that voyage to carry for hire; or on the personal undertaking of the owner; and in a special verdict this must be specially found; on a general verdict, it is presumed. B. R. H. 85. & 194.]

[A. owner of a ship, lets it to B. for a voyage, for a sum certain, and B. to have the benefit of carrying goods; and A. covenants for the condition of the ship, and the behaviour of the master; C. sends gold, and has bills of lading signed by the master; A. is liable and not B. Str. 1251.]

[The plaintiff must sue for the whole penalty at law, but if the defendant thereupon applies to equity for relief, on his paying principal, interest, and costs, the charter-party shall be delivered, and satisfaction acknowledged. 3 Atkyns, 555.]

[If a factor hires a ship, and executes a charter-party, by which the goods to be put on board are made liable to the master; and some merchants load the ship, and agree with the factor at 9*l.* per ton for the carriage, and the factor becomes bankrupt; the merchants are not liable to the owner's demand, nor their goods, but they are liable to pay the factor the freight of the cargo, and as the master has a specific lien on the goods, he must be paid before the assignees of the bankrupt take any thing. 2 Atk. 621.]

[Owners of ships let to freight under the charter-parties of the East India Company are not answerable for damage or loss to the cargo happening by the act of God. Dougl. 272.]

["Ship damage" in those charter-parties, means damage from negligence, insufficiency or bad stowage in the ship, exclusive of what is occasioned by storm or other sea hazard. Ibid.] (*m*)

(*m*) 1. The owner cannot maintain assumpsit for freight, where there is a contract under seal for the payment of it, between the master as such, and the freighter 1 M. & S. 573.

2. A ship captain may sue on an implied assumpsit for freight earned by his vessel. 4 Taunt. 1.

3. In declaring on a contract "for the payment of money due for freight and carriage of goods on delivering of the bill of lading," it is necessary, by averments, to shew, that freight has become due, either from the voyage having been performed, or by a special stipulation to pay it *ab ante*. 2 B. & P. 321.

4. A plea in answer to a demand for freight, that the vessel was unserviceable for want of repairs, (which the owner had covenanted to make) must distinctly certify that it was occasioned through the owner's neglect. 10 East, 555.

~~As to contract between master and owners.~~ Vide NAVIGATION, (I 4.)

~~What contract is good by the law-marine.~~ Vide ADMIRALTY, (E 10, 11.)

[E 8. b. Bill of lading.](n)

(E 9.) Contract by policy of assurance.

A policy of assurance is, when a merchant gives a consideration in

(n) 1. If the acknowledgment in a bill of lading is guarded, by writing "contents unknown," the bill is not evidence either of property in the consignee, or of what goods were shipped. 5 Taunt. 505.

2. Where the freighter has appointed the destination of the vessel, and the master has taken in goods, and signed bills of lading accordingly, he cannot change it without first recalling the bills, or at least tendering an indemnity against them. 12 East, 381.

3. The effect of each bill of lading in a set is equal; so that the one signed first by the captain has no greater force than the one signed last. 1 T. R. 205.

4. When the master of a ship receives goods on board, and gives a receipt for them, he is bound not to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. 2 Mars. 127. 6 Taunt. 433.

5. Indorsing the bill of lading is not essential to the transfer, by the owner of a cargo, of his property therein. 5 Taunt. 74.

6. A. deposits goods with B. as a security for money advanced by B., with a promise to deliver the bill of lading when it should arrive indorsed to B. C. is employed as a broker, to dispose of the goods for B.'s benefit. Before the bill of lading arrives, the goods are attached in the mayor's court in the hands of C. by a creditor of A. Held, that the transfer of the property to B. was complete, though the bill of lading had never been indorsed, and that therefore the foreign attachment was no answer to an action by B. against C. for the proceeds. 1 Mars. 226. 5 Taunt. 558.

7. A bill of lading to deliver to the consignee or his assignees, is, by the custom of merchants, a negotiable instrument, passing the property in its contents to the assignee. 2 T. R. 65. S. C. 5 T. R. 683.

8. Where a bill of lading is indorsed and delivered to a creditor, as a security for his debt on his own account, the property passes to him, so that the indorser cannot afterwards insure it. *Secus*, where the intention of the parties was, that the bill should be taken, not as satisfaction of the debt, but as a collateral security only; where the creditor is only to receive the net proceeds; and where the goods remain at the risk of the consignor. 1 T. R. 745.

9. Indorsing a bill of lading without consideration, does not transfer its contents; hence, such indorsement to an agent, that he may receive the goods mentioned therein, will not, as it seems, entitle him to have trover for them in his own name. 4 East, 211.

10. A *bonâ fide* indorsement by the consignee, for a valuable consideration, transfers the property, though the vendee knew that only acceptances of the consignee not due had been given for the goods. 9 East, 506.

11. The indorsement by a factor, the indorsee of a bill of lading, for value, and without notice, of goods at sea, transfers the property. 4 Burr. 2051. 1 Blk. 628.

12. An indorsement and delivery of a bill of lading by way of pledge, by the consignee, though without notice, is unavailing. 4 Taunt. 24. 6 East, 17.

13. If the different bills of lading in a set are indorsed to different persons, the title of the first indorsee in order must prevail. 1 T. R. 205.

14. If goods shipped by order and at the risk of A. under bills of lading making them deliverable to the order of the consignor, who transmits the invoice, and one of those bills unindorsed to A. are delivered to A. by the captain, the property is vested in him, notwithstanding another of the bills is sent indorsed to the consignor's agent, and though A. did not accept the bill drawn for the amount. 4 East, 211.

15. Where the agents of the consignee, without his privity or confirmation, substitute other goods in lieu of the original cargo, the substituted goods do not pass under a previous indorsement by the consignee of the bill of lading. 5 Taunt. 74.

16. A pledge by the owner (or part owner) of the bills of lading, by which the goods are deliverable on payment of freight, who is likewise owner of the vessel, is a pledge of the freight. 4 Taunt. 155.

money

money to others, to assure his goods, ship, or other thing by him adventured, upon such terms as may be agreed between the merchant and assurers. Vide st. 43 El. 12.

This usage was introduced by the emperor Claudius Cæsar, and recorded amongst the laws of Oleron, and afterwards used amongst merchants in England, and since in other kingdoms. Ma. 105.

And by the st. 43 El. 12. it appears, that this usage is common when a grand adventure is made in parts remote, whereby, if the ship perishes, the loss is divided amongst many.

And upon this statute the king may make an office for entry of policies. R. Hard. 351.

By the instrument, or policy of assurance, in consideration of a premium of so much *per cent.* to be paid by the merchant, the assurers assure such a ship, her tackle and keel, &c. from London to such a port; and if the ship, &c. perish, every subscriber pays the sum by him subscribed for recompense of the loss. 2 Sand. 200.

So, an assurance may be made for a ship, &c. in her voyage to such a country, or port, and her return to London. 2 Sand. 200.

Or, for a voyage to such a country, and to trade there, and return to such a port. Ibid.

So, it may be for the goods and merchandizes laden in such a ship. Ma. 106.

Or, for such and such goods in particular. Ibid.

Or, for goods laden, or to be laden in any ship at such a port, or from such a country to London. Skin. 327.

So, for money; though he has no interest in the ship or cargo, except what he lends upon bottomree bond. Cont. 2 Ver. 269. R. acc. 2 Ver. 717.

So, an assurance may be made upon ship and goods, lost or not lost. 2 Sand. 200. (Vide Ma. 107.)

For the goods of A. without account, if proved that A. had goods there, though the particulars are not proved. Skin. 405.

So, it may be made for the life of any person. Ma. 107.

So, a policy may be explained by a parol agreement; as, that it shall not take effect till the ship arrive at such a place, though the policy be from London. Sal. 444, 445. Cont. Skin. 55.

That it shall be for the ship A., where B. is commander; though the policy by mistake was for the ship B., where D. was commander, Per Holt, Sal. 444.

So, if the policy has a blank for the time of the insurance, it shall be helped by a verdict. Semb. F. g. 275.

If the ship or goods insured be lost in whole or in part, every assurer shall make recompence according to his subscription, or *pro rata* in proportion thereto. Ma. 105. 108. 118.

But a fraud in him that makes the assurance will excuse the assurer: as, if the owner of a decayed ship after assurance destroy the ship. Ma. 107.

Or, if the ship perish by his default. Ibid.

Or, the default of the pilot. Ma. 109.

Or, the ship be insured as the ship of an ally, when it was the ship of an enemy. Skin. 327.

So,

So, if a man knows the ship, &c. to be lost before assurance. Sho. 324.

Though the assurance was for the ship, lost or not lost. Ibid.

So, if the words are general, without saying, lost or not lost; if the ship was lost before assurance, though the assured did not know it. Sho. 324.

So, if the voyage be changed, or a deviation made by the default of the assured. Sho. 324.

Or, of the master. Sho. 325.

Or, the goods are transferred to another ship. Sho. 325.

So, the assurer shall not be charged for goods, &c. embezzled, or stolen by any of the mariners. Ma. 109.

Or, taken feloniously out of the ship. Ibid.

Though the assurance be against pirates, thieves, &c. for it shall be intended of public thieves, as enemies, pirates, &c. Ibid.

So, by the custom of merchants, if an insurance be upon goods in a ship to such a certain value, every insurer subscribing, after the whole value subscribed, shall return his premium, and shall not be charged for the goods lost. R. Sho. 133.

Though the first subscribers prove insolvent. Sho. 133.

So, the assurer shall not be charged, if the assured does not perform the terms on his part: as, if a policy has the words, "warranted to depart with convoy;" for that imports that the assured shall take convoy for his security; and if he does not, the assurer shall not be charged. R. 3 Lev. 320. 4 Mod. 60. Sho. 326.

And it is not sufficient, that he took convoy for his departure, if he did not take it for the whole voyage. R. 3 Lev. 320. 4 Mod. 60. Sal. 443. [Doug. 72. 735.]

If the ship make a deviation in her voyage. 4 Mod. 60.

If the assured act contrary to his agreement. R. 4 Mod. 60.

If there are mutual covenants, and the one is the cause, whereby the other cannot be performed. Sho. 324.

But if the convoy be separated by tempest, and the ship in search of the convoy be taken, it is not such a default that the assured shall lose his insurance. R. 3 Lev. 321. 4 Mod. 60. Sho. 326.

So, if a convoy be taken at the usual place, viz. at the Downs, though he depart without it from London. Per three J. Holt. cont. Sal. 443.

So, if the assurance be, till the ship be discharged from the voyage, she is not discharged by arrival at the port, till the goods are unladen. R. Skin. 243.

But the usual perils, expressed in policies of assurance, against which the assurer insures, are

(1) Perils of the sea. Ma. 108.

And therefore, the assurer undertakes to assure against all damages by tempest or shipwreck. 2 Rol. 248. 1. 35. D. Sal. 443. Sho. 323.

If he assure against perils by distress of weather, the assurer shall pay. if the ship be lost in the sea, not if it be lost by capture of an enemy, R. Skin. 3.

So, against all dangers upon the sea by pirates, or men of war. R. 2 Rol. 248. 1. 40. 4 Mod. 60. Sho. 322.

So, against seizure by the government. Dub. Sal. 444.

(2) The usual hazards expressed in policies are, men of war, enemies, pirates, rovers, thieves. Ma. 109.

So, against barratry of the master himself. Per Holt, Sho. 326.

And every fraud of the master will be barratry; as, if he run away with the ship, or embezzle the goods. R. 2 Mod. Ca. 230.

And therefore, it is sufficient to assign a breach, and find by the verdict, *quod per fraudem et negligentiam magistri, &c.* 2 Mod. Ca. 231.

But mere negligence does not amount to barratry. R. 2 Mod. Ca. 231.

(3) Restraint of princes, embargo. Ma. 110, 111.

But such a policy does not assure against restraint for non-payment of customs. 2 Ver. 176.

Or, if the assured navigates contrary to the laws of the country. 2 Ver. 176. (o)

(o) MARINE INSURANCE. — 1. *Properties of.* A policy is a mere contract of indemnity. Dougl. 470.

2. *Subjects of.* Freight may be insured for part of the voyage. 15 East, 324.

5. If the goods are so situated, as to create a well-grounded expectation of freight being raised, freight is insurable and recoverable. 1 B. & P. 656.

4. The expected profits of goods employed in trade on the coast of Africa, are insurable. 2 East, 544.

5. Insurance on imaginary profit from Bourdeaux to Hamburgh, (explained to mean profit, which a cargo of indigo would produce on sale thereof at Hamburgh,) held good. 2 East, 549.

6. That an assured on profits may recover, it must appear that there would have been some profit, had not the peril happened. 6 East, 516.

7. Expected profits may be insured by an open policy. 16 East, 218.

8. A person having a *respondentia* interest, cannot insure it as an interest on the goods. 5 Burr. 1594. 1 Blk. 396.

9. A policy may be effected generally "upon ship or ships." 2 H. B. 545.

10. *Nature of the interest.* If the assured be interested when the risk commenced, though he was not when the policy was made, it is sufficient. 2 Taunt. 237. 2 B. & P. 155. 155.

11. A joint tenant or tenants in common, has such an interest in the entirety, as will entitle him to insure. 2 B. & P. 240.

12. An equitable interest is insurable. 2 T. R. 187.

13. The chance of a grant from the crown, gives no right to insure the subject-matter. 11 East, 428.

14. Property liable to seizure for an act already done, is insurable. 8 T. R. 562.

15. The right to freight results from the right of ownership in the vessel; the owner, therefore, alone has an insurable interest in the freight. 5 T. R. 709.

16. If a ship and freight are insured, and the ship is lost whilst careening, before the cargo is put on board, the insurer is liable for the ship only, and not for the freight she might have earned. 2 Str. 1251.

17. Ships belonging to a foreign power are detained by his majesty's orders; commissioners are duly appointed by the king, to manage, sell, and dispose of them to the best advantage according to instructions to be by him given, who insure with the assent of the lords of the treasury. War is afterwards declared against the foreign power; the ships are condemned as prize; a loss happens, and the commissioners sue on the policy, averring the interest to be in the king. Objected, 1. That the king held no interest in the ships when the insurance was made; 2. That it was not made on his behalf; 3. That it had not been ratified by him. Objections over-ruled. 1 Taunt. 325. 2 N. R. 269. 3 B. & P. 75. 8 T. R. 15.

18. The captor of a vessel taken as prize has an insurable interest. 8 T. R. 154.

19. The captors of property, in a conjunct expedition by the navy and army, against a fortress on the land, since 45 Geo. 3. c. 72., have an insurable interest before condemnation. 11 East, 619.

20. A creditor has an insurable interest in goods consigned by the debtor, of his own accord, to a third person, in trust for the creditor. 1 B. & P. 315.

21. A

21. A debt which arises in consequence of the articles insured, and which would have given a lien upon it, gives an insurable interest *pro tanto*. 1 B. & P. 316.

22. The consignor's general agent, through whom the bills of lading are transmitted to the consignee, with instructions to forward them, that the consignee may have an opportunity of insuring, may, on the consignee's repudiating the transaction, insure in his own name. 1 B. & P. 316.

23. Property purchased with the proceeds of an illegal cargo, is insurable. 8 T. R. 562.

24. Receiving payments, as for a total loss on a capture, does not preclude the assured suing and labouring to obtain restitution; who therefore may insure any interest thereby acquired in the subject-matter. 14 East, 522.

25. A case in which the assured was held to have an insurable interest as upon a hotch-potch right, and also as representing one, the common agent of all concerned. 14 East, 522.

26. An alien in possession, as owner of a vessel belonging to his country, has an insurable interest, whether or not the lawful owner. 2 Taunt. 237.

27. Money lent on bottomree or *respondentia*, shall be lent only on the ship, or on the goods, and shall be so expressed in the bond; benefit of salvage to the lender, who alone may make assurance on the money lent, and no borrower shall recover more than his interest, exclusive of the money borrowed; and if his share amounts not to the money borrowed, he shall be responsible to the lender for the difference, with interest, though the ship is lost. 19 G. 2. c. 37.

28. In all actions, plaintiff is, on fifteen days' request, to declare how much he has insured, and how much he has borrowed at bottomree or *respondentia*. And defendant may pay money into court. 19 Geo. 2. c. 37.

29. *Void and avoided*.—False warranty in a policy of insurance will vitiate it, though the loss happen in a manner not affected by such falsity. 3 Burr. 1419. 1 Blk. 427.

30. If the assured ask leave of the indemnitors to carry a letter of marque, which is refused, notwithstanding which it is taken out, this vacates the policy, though the intention was not to make use of it, and though it was not used, on the voyage insured. 5 T. R. 580.

31. That the taking a letter of marque on board may avoid a policy, it must be valid in all its circumstances. 6 T. R. 379.

32. If a ship insured is condemned for carrying simulated papers, contrary to the law of nations, without having any liberty in the policy to do, the underwriters are discharged. 15 East, 46. Id. 70.

33. Whether the taking on board prisoners of war increases the risk, is a question of fact for the jury. 1 Taunt. 227.

34. If goods are insured on board a ship from London to Nantz, with liberty to call at Ostend, and she is cleared only for Ostend, but sails directly for Nantz, that being the known course of trade, in order to save certain duties, both here and in France, there is no fraud on the underwriter so as to discharge the policy. Dougl. 251.

35. If an insurance is made before the commencement of hostilities, but when an immediate war is universally expected, the insured is not bound to give the underwriter notice, though the ship does not sail till after the war commences. Dougl. 251.

36. Taking out a false custom-house clearance, necessarily and in the *bonâ fide* furtherance of a lawful adventure, does not vacate the policy. 11 East, 135.

37. The master of a vessel, subjecting her to detention under an embargo, in pursuance of the preconcerted purposes of the freighter and owner at the increased hazard of the underwriter on ship, does not vacate the policy. 7 Taunt. 462. 1 Moore, 163.

38. Where freighters were to pay a gross sum, if the shipping a return cargo in a foreign country was prevented, an insurance, whereby the underwriters agreed to pay a total loss, in case the ship was not allowed by the government of that country to load a return cargo, was held legal. 11 East, 252.

39. An insurance against the event of a cargo not being suffered to be landed, is legal, and an indemnity for any loss proved to have been thereby sustained. 12 East, 124.

40. The master may insure his wages. 2 N. R. 206.

41. Where the policy is valued, the circumstances of an alien enemy having a distinct interest throughout the entirety, is immaterial. 3 Taunt. 506.

42. Where a vessel is chartered on a voyage out and home, and a licence is requisite to legalize the homeward adventure, otherwise prohibited by the navigation act, the licence need only be obtained before such adventure commences. Therefore the underwriter is liable for a loss before it had commenced. 4 Taunt. 856.

43. The st. 42 Geo. 5. c. 77. authorizes any British vessel to trade as well as to fish

on the western coast of South America, within the limits therein prescribed; and the 45 Geo. 3. c. 34. gives the same privilege to neutral vessels as are given by 42 Geo. 3. to British ships. Therefore, a voyage at and from Lima, or any other port or ports of South America, by a Portuguese ship, having a licence, was held to be protected by the two acts. Mars. 440. 7 Taunt. 193.

44. An insurance on a voyage expressly prohibited by the laws of this country, is void. Dougl. 254.

45. An insurance of enemy's property is void, being illegal. 6 T. R. 35.

46. A sailor cannot insure his wages, or any thing that he is to receive at the end of the voyage in lieu of wages, as slaves, for instance. 7 T. R. 157.

47. Adding to an insurance contract by several, whereby they engage to insure each other's ships separately, in certain proportions, that in case of the insolvency of any members, the rest shall be answerable for his subscription, avoids it. 7 T. R. 338.

48. A policy on ship is avoided by illegal traffic at the place at and from which she is insured. 8 T. R. 562.

49. The insurance of an alien of an adventure, in violation of our municipal regulations, is not merely void, but illegal. 3 B. & P. 31.

50. By 19 G. 2. c. 37. no insurance can be made on any ship or goods of the king or his subjects, interest or no interest, or without benefit of salvage.

51. But privateers, and goods from the dominions of Spain and Portugal, may be so assured. 19 G. 2. c. 37.

52. Whether a policy is a wagering policy, or upon interest, depends upon the facts, and not upon the understanding of the parties. 1 T. R. 504.

53. An agreement to pay 20l. to the defendant at the next port a ship should reach, provided that if she did not save her passage to China, the defendant would pay to the plaintiff 1,000l. at the end of one month after she arrived in the river Thames, without reference to any property, though one of the parties had some goods on board, liable to suffer by the loss of the season, is a wagering policy within 19 Geo. 2. c. 37. Cowp. 583.

54. A policy upon the sex of a person is a wagering policy, within 14 Geo. 3. c. 48. Cowp. 737.

55. A valued policy of insurance is not to be considered a wager policy. 2 Burr. 1167.

56. The insured is entitled to recover as for a total loss, upon a mixed policy of insurance, of a peculiar sort, and valued policy, if a fair one, being within the exception of st. 19 Geo. 2. c. 37. 4 Burr. 1966.

57. Policies on foreign ships and property are not within 19 Geo. 2. c. 37. Dougl. 316.

58. If facts, not disclosed by the broker for the insured, in a representation of the state of the ship, appear material to the jury, though they did not to the broker, who merely on that account abstained from mentioning them, the insurance is void. Dougl. 306.

59. It is sufficient if the assured, in making the assurances, communicate fairly the present state of the ship, and lay open such circumstances, *pro* and *con*, as may lead the insurer to make further inquiries concerning the prior state of the ship. 3 Smith, 424. 7 East, 457.

60. Every intelligence, though eventually it prove false, which may influence the underwriter's determination, must be communicated. 14 East, 494. 3 Taunt. 37. 1 N. R. 14.

61. A concealment by the captain from the owners, of a material injury sustained, is, as between the owner and underwriter, a concealment by the owner. 1 M. & S. 35.

62. Nothing need be communicated but what is material to the risk. 2 H. B. 344.

63. A material concealment, though without fraud, vitiates the policy. 1 N. R. 14.

64. The materiality of any communication is not to be tried by the event. 14 East, 494. 3 Taunt. 37.

65. Concealment of the true port of loading will vitiate a policy. 1 Blk. 463.

66. Insurance, 12th November, from Oporto to London. The concealment of the two following letters from the correspondent at the loading port, was held material:—11th Oct. "We are loading the wines on the Stag, Capt. W., who pretends to sail after to-morrow."—13th Oct. inclosing the bills of lading filled up "with convoy." 1 M. & S. 15.

67. Where the insurance was on goods from Berderygge to London, the suppression of a letter, dated a fortnight back, and received the day before, stating that the captain would sail next day, and desiring that if the ship had not arrived, to insure as low as possible, was held material. 1 N. R. 14.

68. A letter stating that the ship, which ought to have gone to Falmouth to join convoy,



voy, had been seen at sea without convoy, and that this was supposed to have been occasioned by contrary winds, should be communicated. 1 Mars. 99. 5 Taunt. 359.

69. If the circumstance of advice having been received that the ship was leaky and suddenly disappeared, be concealed from the insurer, the policy is void, though the ship be not lost, but captured. 2 Str. 1183.

70. The fact that a ship, insured at and from a place, has not yet reached it, need not be communicated to the underwriters, unless demanded. 14 East, 479.

71. It need not be communicated to the underwriters that the ship, though British owned, is foreign built, and so entitled to sail without convoy. 2 B. & P. 209.

72. Not communicating the fact that two vessels, which left much about the time as the one insured was expected to leave, had arrived, but which were considered faster sailers, held immaterial. 1 N. R. 151.

73. Under a policy at and from London, the fact that the ship has sailed need not, unless demanded, be communicated. 5 Taunt. 581.

74. The time of a ship's sailing is not in general a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship. 1 Mars. 117. 5 Taunt. 450.

75. An underwriter is presumed to know the nature and peculiar circumstances of the branch of trade to which the insurance relates. 4 East, 590.

76. Facts against sea-worthiness need not be communicated unless required. 4 East, 590.

77. A case in which the question was, whether there had been a material concealment on insuring an African trader. 7 East, 457. 3 Smith, 424.

78. A representation need be only substantially performed. Cowp. 785.

79. An insurance made under a misrepresentation is void; whether it arose from fraud or negligence. 1 T. R. 12.

80. A representation coupled with a refusal to warrant, shews an intention to exclude it from the contract. 16 East, 176.

81. On a representation that a ship was seen safe on such a day, at a certain latitude or point in the voyage, if it turn out that she had got safe to the point represented, but was lost two days before the day mentioned, the difference, though by mistake, is material. Dougl. 260.

82. A policy being, at and from L'Orient to the Isles of France and Bourbon, and to all or any ports and places, where and whatsoever, in the East Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place, during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival in France, — although the insured, by a representation wavered to the policy at the time of underwriting, state that the ship intended to sail in September or October, and to go to Madeira, the Isles of France, Pondicherry, China, and L'Orient, — if the insured really intended that the ship should sail as early as represented, and that she should go to China, the policy is not discharged, though he afterwards change his intention, and the ship does not sail till December, and goes to Bengal, and not to China. Dougl. 284.

83. A representation that a ship is expected to sail on such a day, from the coast of Africa, is not material, though it turn out that she actually sailed six months before. Dougl. 305.

84. The assured goods is not concluded by a representation made, *bonâ fide*, and upon probable expectation, as to the time of sailing. 10 East, 415.

85. Where the insurance is only for part of the voyage, the ultimate destination need not be communicated. 15 East, 524.

86. Where, on the insurance of a voyage *in futuro*, a representation is made of the ship's previous destination, which is true in fact; unavoidably changing the destination afterwards will not discharge the underwriter. 1 B. & P. 200.

87. A representation made to the first underwriter extends to all the others. Dougl. 305.

88. A misrepresentation to the first underwriter affects the policy as to all subsequent underwriters. Cowp. 786.

89. How far a representation to one underwriter shall enure for the others, and what shall be evidence of it. 3 East, 572.

90. Representations made by the broker to the first underwriter, but to the first alone, are available for the others. 4 Taunt. 869.

91. An insurance, in the common form, upon a ship chartered to the East India Company, and whose distinct voyage is afterwards changed, continues though the alteration was partly for the benefit of the assured. 1 Taunt. 463.

92. If a ship sail on a voyage different from, although coinciding in part with that insured, the policy is discharged, although the loss happen before she comes to the dividing point. Dougl. 16.

93. A deviation occasioned by stress of weather, does not vacate the policy. Nor is the vessel obliged to return to the point at which the deviation commenced. So that if that point be her loading port, and her cargo not complete when she left it, she may finish her lading at the port to which she is driven. 2 T.R. 22.

94. An involuntary deviation does not avoid the policy, though not occasioned by a peril insured against. 1 N.R. 181.

95. Deviation occasioned by force, and deviation occasioned by necessity, are the same. 1 N.R. 181.

96. A deviation from necessity is justifiable. 1 B. & P. 313. Dougl. 291.

97. If an insured ship quit the course described in the policy, from necessity, she must pursue the new voyage of necessity in the direct course, and in the shortest time. Dougl. 284.

98. Where from a certain point, there are different courses to the port of destination, each having advantages and disadvantages, and the custom is for the captain to elect according to circumstances; depriving him of this election, without acquainting the underwriter, avoids the policy. 7 T.R. 162.

99. Sailing from the port of lading to the usual place of rendezvous, for the sake of joining convoy (there being a warranty to sail with convoy) there ready, though such place be out of the line of the voyage. Cowp. 601.

100. Semble, it is no deviation to delay for the purpose of giving assistance to a ship in distress. 2 Smith, 214. 6 East, 45.

101. A policy is not avoided by trading at an intermediate port, at which the vessel has lawfully touched, provided the risk is not thereby enhanced or the voyage delayed. 9 East, 195. 1 Taunt. 450.

102. A policy is not vacated by taking in provender for stock, at a port at which the vessel has lawfully touched, though she sailed under a necessity of so doing, provided no delay is thereby occasioned. 11 East, 347.

103. An unauthorized restriction, imposed by the assured on the captain's election, is immaterial, where the event proves that he would have had no opportunity of making one. 1 M. & S. 46.

104. On a policy at and from Pernambuco, or any other port or ports in the Brazils to London, "beginning the adventure from the loading the goods on board the ship, on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco, but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither. Held, that the ship's proceeding for St. Salvador was no deviation. 1 Mars. 149. 5 Taunt. 480.

105. Where a captain, on a voyage, delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions, (although he transmits a letter at the same time,) it is not a deviation, and it is a question to which the jury are competent. 1 Price, 195.

106. A deviation intended, if the loss happen before it take effect, does not discharge the policy. Dougl. 361.

107. An intention to deviate is immaterial, provided the voyage on which the ship sails, is that insured. 2 H. B. 343.

108. If a ship is insured from one port to another, but takes in goods to be delivered at a third, and is lost before she comes to the dividing point of the two voyages, the insurer is liable. Str. 1249. 2 H. B. 343.

109. An alteration in a policy on goods generally, defining the particular species, avoids it as against those underwriters who do not assent. 4 Taunt. 330.

110. An assured cancelling the date of warranty of sailing in the body of the policy, and substituting a different date in a memorandum in the margin, discharges those underwriters who do not sign the memorandum. 7 Taunt. 416. 1 Moore, 114.

111. A letter written by the captain to the broker after an unavoidable deviation, requesting the opinion of the underwriters on the case, with a view to further proceedings with the broker's answer, that he thinks the policy at an end, will not warrant a conclusion that the captain, who afterwards sails to complete the adventure, had abandoned the policy. 1 B. & P. 313.

112. An insurance of the latter part of an integral voyage, illegal in its commencement, is void. 8 T. R. 31.

113. A valued policy on goods to be thereafter specified, is avoided *in toto*, if the shipment of any portion specified is illegal. 11 East, 502.

114. An insurance against British capture, amongst other risks, is only void *pro tanto*. 1 M. & S. 52.

115. Several owners of different ships having entered into a bond to a trustee,

tee, binding themselves and their assigns to indemnify each other to a certain amount, if any other ships should be lost; and one of them having sold his ship, and ~~she~~ being afterwards lost, the others are not liable under the bond, unless the vendor has sold, together with the ship, his interest in the agreement of indemnity. Dougl. 385. 3 Burr. 1512., that an agreement by the assured to indemnify a purchaser in case of loss, is a continuation of his interest.

116. The refusal of a prize court, reversing a condemnation, to allow the appellant costs and damages, does not enure to discharge the underwriter, at least where it proceeds on the ground of an *ex parte* ordonnance. 2 N. R. 484.

117. By 30 G. 3. c. 33. s. 8., and 34 G. 3. c. 80. s. 10., ship-owners cannot insure cargoes of slaves, except sea-perils, pirates, insurrection, hostile capture, barratry, or fire.

118. *Construction of.* — The terms of a policy are to be understood in their plain, ordinary, and proper sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the words; or unless the context evidently points out, that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense. 4 East, 130.

119. Expressions introduced into a policy may be extended in construction beyond their ordinary signification, with reference to the peculiar situation of the destined country. 15 East, 278.

120. A policy is considered as a contract *uberrimæ fidei*, and always receives a liberal construction for the benefit of trade and of the assured. 1 Burr. 349. 1 B. & P. 316.

121. Where a charter-party has, by the custom of trade, acquired a definite meaning, an insurance on property under it must be construed with reference to that meaning. 1 Taunt. 463.

122. A policy, unless otherwise expressed, imports that the assured is interested in the subject-matter. 3 Taunt. 513.

123. Even admitting that a mere hope of expectation is insurable, it is not covered by a policy by which the parties mean to insure, not the expectation, but the subject-matter out of which it arises. 5 T. R. 709.

124. To recover upon a policy, the loss must be a direct and immediate consequence of the peril insured against; not a remote one. 1 T. R. 130.

125. There is an implied exception against loss arising from an antecedent injury sustained by the vessel, which ought to have been, but was not, made known. 1 M. & S. 35.

126. *Semble*, that in the construction of a policy of insurance, the particular state of the commerce, touching which the insurance is made, may be looked at as a guide. 2 M. & S. 27.

127. Where a vessel is insured from one port to another, the policy attaches though she may have left the port before the day named therein. But then she must have left on the voyage insured; since, if she sailed on a different one, the insurance never attaches. 2 T. R. 30.

128. A policy, "at and from" a place, does not import that the ship is now there; it is sufficient if she arrive there so soon that the risk be not materially varied. 14 East, 479.

129. That a policy on goods at and from X., "beginning the adventure from the loading thereof aboard," or "abroad at X.," may attach, they must have been laden at X. 2 Taunt. 416. 15 East, 16.

130. Policy on goods at and from G., beginning the adventure from the loading, does not cover goods laden before the ship's arrival at G. 4 Taunt. 628.

131. A policy on goods at and from X. to Y., from the loading thereof on board wheresoever, attaches upon goods lading previous to arrival at X., though not landed and re-loaded there. 1 M. & S. 418.

132. That a policy on ship and goods "and at from all and every port, &c. on the coast of Brazil, and after 17th September to the Cape of Good Hope," beginning the adventure upon the goods from the loading thereof aboard the said ship, at all or every port, &c. on the coast of Brazil; and from 17th September, 1800, with liberty to sail to, &c. any places backwards or forwards, under the Portuguese government; with a return of premium should the ship have arrived, or the risk have otherwise ceased, on or before 17th September, may attach; the loading must be on the coast of Brazil. 4 East, 130.

133. *Semble*, where by the usage of a particular trade the cargo is shifting during the adventure, it is covered by an insurance on goods. 8 East, 373.

134. A loading and re-loading at X., of a portion of the goods already on board, sufficient

ficient to enable the custom-house officers to inspect and examine the whole cargo, was held a sufficient loading at X., within a policy, free from average on goods at and from X. to Y., from the loading thereof on board; the fact that they were already on board having been communicated. 16 East, 176.

135. An insurance is made upon goods at and from Gottenburgh to the ship's port to discharge in the Baltic, "beginning the adventure upon the said goods, from the loading thereof on board the said ship." The goods must be loaded at Gottenburgh, or the policy never attaches; so that, if they are loaded at an anterior port, and the vessel arrives with them at Gottenburgh, and is afterwards lost, on her voyage to her port of discharge, the underwriter is not liable. There may be good reason for requiring that the loading should be at Gottenburgh, since, if loaded before, they may be in a damaged state on arrival there. 2 M. & S. 106.

136. An insurance upon a homeward voyage from India, upon goods at and from China, to all or any ports or places whatsoever beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch and stay at, any ports or places whatsoever, for any purpose, until the ship's arrival in London, beginning the adventure upon the said goods, from the loading thereof at China, and so should continue upon the goods, until the same should be discharged, covers only the particular cargo taken in at the first port of loading. 1 Taunt. 463. *Secus*, had it been "forwards and backwards at sea, until the ship's arrival at her last station of discharge," and the adventure out and home. *Id.* 466.

137. Where an insurance is effected upon ship and goods, beginning the adventure upon the goods from the loading thereof at X., and upon the ship "in same manner;" if the policy does not attach upon goods, neither does it upon ship. 4 East, 130.

138. There is a sufficient inception of the voyage within the policy though made under a fluctuating purpose, to be determined by circumstances, whether or not to proceed to the *terminus*. 1 M. & S. 46.

139. If a ship at Bengal is insured in London from her arrival at Fort Saint George, it means her first arrival there in her homeward-bound voyage. 1 Atk. 545.

140. A policy at and from a place attaches at the place, 3 M. and S. 456.

141. If a ship is insured at and from a place, whilst she is there preparing for the voyage, the insured is liable; but if the voyage is laid aside, and the ship lies there several years, with the owner's privity, the insurer is not liable. 2 Atk. 359.

142. On a policy at and from Pernambuco, or any other port or ports in the Brazils to London, "beginning the adventure from the loading the goods on board the ship, on the termination of her cruize, and preparing for her voyage to London." The ship on the termination of her cruize touched at Pernambuco; but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither. Held, that the policy attached at Pernambuco. 1 Mars. 149. 5 Taunt. 480.

143. Under the words "at and from Jamaica" the ship is protected (till her departure on her voyage) in going all round the island. Dougl. 370.

144. A ship, whilst moving from port to port in an island, is covered by a policy at and from the island. 2 Taunt. 301.

145. A policy on freight attaches upon the loading of the cargo; and, if a valued policy, the whole attaches upon the loading of any part of it. Hence, under a valued policy on freight, the assured was held entitled to the full amount where the ship having taken on board part of the cargo, was driven from her moorings and lost; the residue of the cargo was ready on the quay, a circumstance so far material, that it shewed that the insurance was not a gaining one. 3 T. R. 362.

146. An insurance on freight attaches on the ships sailing under that contract by which the freight is to be earned, though there be then no cargo on board. 6 T. R. 478. 7 East, 400.

147. If freight be insured, the assured, in order to entitle himself under the policy, must shew that a right to freight, inchoate, had commenced, otherwise no right has been lost, and so the policy, which is to compensate the assured for the loss of some right or property of which he is proprietor, never attached. A ship sails from London under a charter-party, by which it was covenanted, that the ship being furnished with an outward cargo, should sail with the same from London to some part of the Baltic, not beyond Riga, and having discharged her cargo, should proceed in ballast to Riga, take on board a cargo there, and return therewith to London. The ship being a chartered, not a general ship, acquired an inchoate right to the homeward freight from Riga to London the moment she reached Riga. Therefore an insurance on such homeward freight attached at the same time; so that if the ship is, by one of the perils insured against, prevented taking in a cargo at Riga, the underwriters are liable. 2 M. & S. 278.

148. An insurance on ship only covers the vessel during the voyage, and for twenty-four hours after she has been moored in safety, though the peril through which she was afterwards lost happened during that period. 1 T. R. 252. 260.

149. An insurance on goods to B. until they should be there discharged and safely landed, continues on the goods whilst in a public lighter at B., employed and paid by the merchant to whom they belonged, such mode being usual. 2 B. & P. 430. 432. 3 B. & P. 23.

150. The assured, by undertaking, contrary to the usual course, to see to the landing himself, discharges the underwriter. 1 N. R. 16.

151. An insurance on the freight of a ship, destined for a fishing adventure in the South Seas, is not determined by the arrival of part of the cargo in another ship. 1 Mars. 402. 6 Taunt. 3.

152. A policy of insurance on East India ships includes the chance of their being detained in India, and the risk of the country voyage there. 3 Burr. 1707.

153. The insurance of a ship to Jamaica determines by her mooring twenty-four hours in any port there, and does not continue till she arrives at her last port of delivery. 1 Blk. 417.

155. If a ship insured, on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the British commander there, the policy does not remain in force till she reaches a port of safety. 11 East, 22.

156. Where a ship insured to the port of X., Y., or Z., until her arrival at one as her last port of discharge, passes X., intending to discharge at Z., but finding that the enemy had possession of it, puts into Y. still retaining the intention of proceeding to Z., when friendly, Y. is her last port of discharge. 12 East, 283.

157. Insurance on a ship (a privateer) at and from Jamaica to any parts, &c. at sea or shore, cruising for four months, without farther account, &c. and free from average (before st. 19 G. 2. c. 37.); the insured was interested in the ship to the amount insured. During the four months the crew mutinied, brought the ship by force into Jamaica, and, having carried away the arms, &c. deserted her; by which the farther cruise was prevented. As the ship was in safety in her proper port at the end of the four months, it was holden that the assured could not recover, the insurance being on the ship, and not on the voyage. Willes, 641.

158. The difference between the respective gross proceeds of the goods when sound and when damaged, not the net proceeds, is to be taken as the average loss on damage by sea-water. 2 East, 581. 3 B. & P. 308.

159. The standard of value in the case of an open policy, is the invoice price at the port of loading, including premiums of insurance and commission. 12 East, 639.

160. The proportion of loss is calculated by comparing the selling price of the sound commodity with that of the damaged part of delivery, whether the policy be valued or open. 12 East, 639.

161. On a valued policy, the insured cannot recover more than the actual loss which happened at the time when he chose to abandon. 2 Burr. 1198. 1 Blk. 276.

162. A valued policy on goods cannot, on a total loss, be opened, because the greater part had been expended by the ordinary consumption of the crew, and for which it was designed. 2 East, 109.

163. A valued policy may be opened by shewing that part only of that intended by the valuation has been lost. 13 East, 323.

164. If freight be insured generally, and the insurance be not of a specific freight, though the adventure be protracted by one of the perils insured against, for instance, restraint of princes, yet if the ship ultimately brings home a cargo from the port in question, there has been no loss of freight. The contract of insurance is not that any particular freight shall be brought home, but that a freight generally shall be earned, which it has been. 2 M. & S. 278.

165. That an assured on bottomry may recover, the ship must have been actually lost. 1 M. & S. 30.

166. The insurance on ship from all arrests, restraints, &c. covers the body of the ship, her tackle, and furniture only; not, therefore, seamen's wages and provisions expended during a detention under an embargo. 1 T. R. 127. 132.

167. Provisions for the crew being part of the outfit, are included under the word "furniture" in a policy on the ship and furniture. 4 T. R. 206.

168. An insurance of British property from all risks whatever, British capture, seizure, and detention included, is legal. 3 Smith, 401. 7 East, 449.

169. In the construction of a policy of insurance, the nature of the commerce in which the property insured is embarked, may be taken into the account; by which

means an inference, which in ordinary cases is drawn, touching the sense in which expressions in the policy are used, may be rebutted by an inference drawn from the extraordinary state of the commerce. Thus an insurance against seizure, in ordinary cases, does not include seizure by the assured's own government, because the inference is, that the underwriter never meant to make himself responsible for the act of the assured himself. But where, from the state of public affairs, and within the knowledge of the parties, such seizure is a probable event, and only to be avoided by simulation and deceit; and when the policy expresses that such simulation and pretence may be used by the assured, the natural inference is, that the parties mean to insure against seizure by the act of the assured's government, which, if they please, it is competent for them to do. 2 M. & S. 94. 5 Taunt. 824.

170. Insurance of slaves from loss by natural death is made illegal by st. 30 Geo. 3. c. 33. s. 8., & 34 Geo. 3. c. 80. s. 10. A loss from failure of proper nourishment, resulting from a delay occasioned by foul weather, is a loss by natural death, and not perils of the seas. 6 T. R. 656.

171. Where the loss immediately results from a peril of the sea, it is covered by the policy, though that peril was induced by a foreign cause. 2 N. R. 336.

172. A loss sustained by a ship's bilging while hove down to repair, is not a loss by perils of the sea. 3 Taunt. 227.

173. Where the ship insured is run down by another, not through design, but negligence, the loss is by the perils of the sea. 4 Taunt. 126.

174. Barratry is every species of fraud or knavery in the master or mariners of a ship by which the owners or freighters are injured; and a deviation, if such, is barratry, whether the loss happen during such fraudulent voyage or afterwards. Cowp. 143. Loft. 631.

175. So a wilful deviation, and smuggling by the captain, are acts of barratry. 1 T. R. 252.

176. Since, however, barratry is something contrary to the duty of the master and mariners as such; and since, then, this duty is owing to the ship-owner only, for to him alone do they stand in that relation, it follows that barratry can only be committed against the owner, and without his consent; since, if with it, there has been no breach of duty. Hence, too, a ship-owner can never commit barratry. 1 T. R. 323.

177. An insurance of a vessel "in any lawful trade" has reference to the trade in which the owner may employ her; if, therefore, the master barratrously employ her in an illegal trade, whereby she is forfeited, and barratry be one of the risks insured against, the underwriter is liable. 3 T. R. 277.

178. If the master of a vessel deviate from his course, or drop anchor in the course of his voyage, for a fraudulent purpose of his own, he is guilty of barratry. 4 T. R. 33.

179. The criterion of barratry is, whether the ship-owners would be liable to the freighters from the (alleged) misconduct of the captain. 6 T. R. 739.

180. Barratry is any act contrary to the captain's duty towards his owners. 6 T. R. 383.

181. Barratry must partake of something criminal; must be some breach of trust in the master *ex maleficio*. 7 T. R. 505.

182. An intention to injure the owners is not essential to barratry. 8 East, 126.

183. The assured is entitled to recover as for a loss by barratry, from whatever cause it proceeded, and though the loss resulted from other causes as well. 1 Taunt. 227.

184. If the owner of a vessel fully laden by the freighters, collude with the captain to run her on shore, this amounts to barratry, although, by the terms of a charter-party entered into between such owner and the freighters, the former was entitled to put goods on board during a previous part of the voyage. 1 Moore, 373.

185. The word "people," in a common policy of insurance, means, the ruling power of the country; not, therefore, a mob, or pirates. 4 T. R. 783.

186. The clause of indemnity in a policy, against arrests of princes, people, &c. extends to an embargo laid by the government of the country in the port at and from which the ship is insured. 6 T. R. 415.

187. In the insurance against detention of princes, &c. there is an implied exception of any loss happening in the course of any contraband adventure in which the goods would become liable to seizure as forfeited by the laws of the country. 4 East, 410.

188. A detention by a king's ship, whereby the assured was prevented reaching the port of destination before an embargo was laid on, as he otherwise might have done, is not a loss within the risk of detention by princes, &c. 11 East, 205.

189. A permission by one government to another to seize property within its territory, is not a confiscation by the former. 15 East, 267.

190. If a ship insured to the port of London, and till there moored twenty-four hours

in good safety, arrives the 8th, is that day served with order to return to perform fourteen days quarantine, the crew desert, captain petitions to be excused, petition adjourned to 28th, and then ordered back, she returns, performs the quarantine, applies to air the goods, and before her return is burnt, the insurers are liable. Str. 1243.

191. A ship coming into port with her death's wound, is not moored twenty-four hours in safety because she does not sink until the expiration of that time. 2 East, 209.

192. A mooring twenty-four hours in safety, means in freedom from political as well as physical danger. 15 East, 46.

193. The clause in a policy enabling the assured "to sue, labour, and travail, without prejudice to the insurance," means this and no more; that after an event has happened which gives the assured a claim upon the underwriter, he shall not be prejudiced by any acts of the captain done in the interim between that event, and intelligence received. 1 T. R. 613.

194. Parties must be taken to have contracted with reference to the laws of the country in which the contract is made, unless they have either expressly or by implication taken another rule for their guidance. The question, therefore, what is a general average within the meaning of a policy of insurance, must be decided by ascertaining what is accounted such by the law of England; unless it can be shewn, that at the place where the adventure is to determine, and where, therefore, a general average would be demandable, it is the known and invariable usage of merchants to treat losses, as the subjects of general average, which by the laws of England, are not so; since, then, an understanding to be governed by the usage of the place may be inferred. But that usage must be provided by other evidence than the judgment of a court at the place where the adventure terminated, such, being in foreign parts, deciding that such losses are, by the laws of that country, the subject of general average. 4 M. & S. 141.

195. An insurance with liberty to cruise six weeks, means six weeks successively from the commencement of the cruise. Dougl. 527.

196. On a policy of insurance with or without letter of marque, and liberty to chase, capture, and man, the assured cannot delay on the voyage merely for the purpose of conveying the prize into a port of condemnation. 2 Smith, 214. 6 East, 45.

197. Leave granted in a policy on a fishing voyage to chase, capture, and man prizes, does not authorise the waiting off a port for an enemy to come out, on completing her lading. 2 Taunt. 428.

198. Liberty "to touch at any port or ports for orders," does not warrant the assured's retracing his course. 16 East, 312.

199. There is a policy of insurance "at and from London to the ship's discharging port or ports in the Baltic, not specifying any particular port, with liberty to touch at any port or ports for orders, or any other purpose." Since there is no *terminus à quo et ad quem*, there is no prescribed course; the ship, therefore, the words so comprehensive, may, after touching at and passing a port, retrace her steps and revisit it, if done without fraud, and in the *bona fide* prosecution of the adventure. *Secus*, had there been fixed *termini*. Here the adventure was a seeking one. 2 M. & S. 27.

200. If a vessel calls at more than one of the places of call, she must take them in the order named; or, in the usual course, where not named in any order. 3 Taunt. 16.

201. A policy on goods at and from A. to B. with liberty to touch at C. for any purpose whatever, beginning the adventure from the loading on board as above, includes liberty to touch at C. for the purpose of taking in part of the goods insured. 3 Taunt. 419.

202. Policy from London to the ship's discharging port in the Baltic, with liberty to touch at any port or ports for orders. The ship may, before her discharging port is fixed, go backwards and forwards to ports for orders in any succession whatever. 5 Taunt. 496.

203. Where two ports of discharge are named in a policy; to avoid a deviation the ship must take that first which stands first in order, without regard to their relative situation to the loading port. 6 T. R. 531. 533.

204. An insurance on ship, on a voyage to A., B., and C., means a voyage to all or any of them; only, that if she visits more than one it must be in the order described. 3 East, 572.

205. Under a policy to any and all ports and places in the Baltic forwards and backwards, the assured may retrace his course. 16 East, 312.

206. Insurance on freight on a voyage at and from Demarara, Berbice, and the Windward and Leeward Islands, to London, means, in the absence of any usage to the contrary, from any of those places direct to London. 1 N. R. 23.

207. An insurance at and from Martinique, and all and every of the West India Islands,

Islands, does not limit the course from M. to such only as lie in the track from thence to the port of discharge. 4 Taunt. 229.

208. Where the town and port are of the same name, the insurance, unless the country is warranted by usage, is applicable to the town, not the port and its dependencies. 2 Taunt. 403. 405.

209. The extent of a port is a question of fact for a jury. 4 Taunt. 662.

210. Whether the place of a ship's capture be within her port of discharge is a question of fact. 4 Taunt. 722.

211. On an East India voyage, under a policy, at and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch in the outward or homeward bound voyage at the Isle of France and Bourbon, and at all or any other place or places what or wheresoever; and that it shall be lawful for the said ship in this voyage, to proceed and sail to, and touch and stay at, any port or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation. The general words are qualified and restrained by the expressions, "in the outward or homeward bound voyage," and, "in this voyage," to mean all places in the usual course of the voyage to and from the places mentioned in the policy. Dougl. 284.

Under such a policy it is a deviation to go to Bengal. Ibid.

212. The usual words in a policy on a ship chartered to the India Company, "to all or any places, in port and at sea, in all places, at all times, and in all services," are inserted, that although she should be used as a ship of war, or in whatsoever employment she might be, or whithersoever the company should send her, the policy should continue. 1 Taunt. 463.

213. Where a ship has liberty to wait in or off any port for all purposes, it is a question for the jury, whether her stay for the purposes of the adventure exceeds a reasonable time. 4 Taunt. 511.

214. In a policy on alien property, there is an implied exception of hostilities between the alien's country and our own. 4 East, 306. 407. 410. 3 B. & P. 191.

215. Under an insurance of goods from X. to Y., in any neutral ship, it is sufficient if the ship be neutral when she sails. 3 T. R. 477.

216. The prohibition, by a foreign state, to discharge the outward cargo, occasions a total loss within a policy undertaking to pay a total loss in case the ship was not allowed by that state to load a return cargo. 11 East, 232.

217. In a policy at and from London to Berbee, after the clause "beginning the adventure," &c. are inserted the words "at sea," and at the bottom of the policy the words "on ship." The ship without express leave so to do, stops at Madeira, by which means she loses the convoy and is captured on her way from Berbee. Held, that the insertion of the above words does not imply that the risk commenced at sea, so as to justify the deviation; though, at the time of effecting the insurance, the underwriters were informed that the ship had been at Madeira. 1 Mars. 156. 4 Taunt. 462.

218. If a man who has lent money on bottomree or *respondentia* insures on goods he cannot recover; for bottomree or *respondentia* must be specified in the policy. 3 B. M. 1594. 1 Blk. 396. 405. 422.

219. *Warranty*. — A stipulation, though written on the margin of the policy, is a warranty. Dougl. 11. But if on a separate paper, though pinned or wafred to the policy, it is only a representation. Dougl. 12. 13.

220. Whatever is written in the margin of a policy is a warranty. 1 T. R. 345. 2 T. R. 186. *sub fine*.

221. There is a distinction between a warranty and a representation. A representation is fulfilled, if it be equitably and substantially answered; but a warranty, no matter for what purpose it was introduced, must be strictly complied with, for it is understood between the parties that it shall be. 1 T. R. 345. 2 T. R. 186. 3 T. R. 360. Cowp. 785.

222. A warranty in a policy lost or not lost, that the goods are well on the day of making the policy, is satisfied by their being in safety, at the time of that day, though the ship be lost on that day, and before the insurance was made; since by this construction alone are the words "lost or not lost," and the warranty made consistent. 3 T. R. 360.

223. The assured are not entitled to recover, unless they equip the ship with every thing necessary to her navigation during the voyage. The ship itself must not only be sea-worthy; she must have a sufficient crew and a captain, and a pilot of competent skill. 7 T. R. 160.

224. A foreign ship not represented as of the country to which she belongs at the time of insurance made, nor named as such in the policy, need not be documented as such. 7 East, 367.



225. Under a policy on ship at and from the condition that she shall be seaworthy for the voyage, does not attach till her sailing. 5 Taunt. 299.

226. A policy on ship at and from, attaches, if the ship, though not sea-worthy for the voyage, is sufficiently so for present purposes. 5 Taunt. 299.

227. Where, after a ship has been stranded, and average loss is sustained in the articles contained in the usual memorandum, not from the stranding, but another cause, the assured cannot recover as for a loss by stranding. 4 T. R. 783.

228. If a mob, having taken possession of a ship, weigh anchor, whereby she is stranded, &c. this is a loss by stranding, within the meaning of the policy. 4 T. R. 783.

229. A policy of insurance (as usual) contained a memorandum, by which certain articles were warranted free from average, unless general, or the ship be stranded. A ship under cargo of a pilot, over whom and whose taking charge of the vessel, the owner has no controul, is by his directions and contrary to the master's advice, fastened by a rope to the shore in a particular place, with the intention that she should take the ground when the tide fell. The vessel accordingly takes the ground; but, being sharp built, falls over, bilges and breaks some of her timbers, whereby she fills, and the articles mentioned in the memorandum sustain an average loss. Held that this was a stranding within the meaning of the memorandum. 4 M. & S. 77.

230. Lord Kenyon held, that a ship which was damaged upon some wooden piles in a river, was stranded. 4 M. & S. 80.

231. To constitute a stranding, within the meaning of that term, in a policy of insurance, there must be a settling of the ship upon the place where she strikes from which great damage may and commonly does ensue; so that the ship may, *pro tempore*, be considered as wrecked. The striking of a ship upon a rock and remaining there upon her beam-ends for a minute and a half, is not a stranding. 4 M. & S. 503.

232. Under a warranty that the ship and cargo are neutral property, it is sufficient that they are so when the risk commences. Dougl. 732.

233. A policy on a ship warranted neutral is avoided by the ship afterwards so conducting herself as to forfeit her neutrality. 8 T. R. 230.

234. A warranty that a ship is American, means that she is so navigated as to entitle her to all the privileges of that flag. 7 T. R. 705.

235. The underwriter is liable to an assured on goods on board a neutral ship, condemned, for want of documents necessary to entitle it to the privileges of its national character, provided there is no warranty of such character, and that the assured is not owner of the vessel. 14 East, 574.

236. If a neutral ship is condemned from the want of documents necessary to entitle it to the privileges of its national character, though there be no express warranty of such character, the underwriter is not liable. 14 East, 574. Vide 16 East, 186.

237. There is no implied warranty on the part of the owner of goods insured that the ship shall be in all respects properly documented. 15 East, 35.

238. There is an implied warranty that a neutral ship, represented to be such, shall be properly documented to prove her neutrality, though thereby she would be exposed to confiscation, from an *ex parte* ordonnance of the enemy. 5 Taunt. 285.

239. A register is not a document required by the law of nations, as expressive of a ship's national character. 4 Taunt. 367.

240. Goods being shipped on board an American ship, the President, a policy was effected by mistake, calling the ship "The American ship President," or by whatever other name the said ship is or shall be called. Held, that the plaintiff was entitled to recover under the general auxiliary words, there being no fraud. 2 Smith, 492. 6 East, 582.

241. *Seemle*, that in a policy on ship or ships, there is an implied warranty that the names are not known. 5 Taunt. 37.

242. Insurance free from average, unless general, does not extend to damage received by the goods in a storm. 5 Burr. 1550. 1 Blk. 507.

243. If the ship be stranded in the course of the voyage, the underwriters are liable for an average loss on the articles in the memorandum, arising from the perils of the sea, though no part of the loss arises from the act of stranding; for if the ship be stranded, it destroys the exception or condition, upon which the articles enumerated are to be free from average, and the body of the policy then operates upon them as much as upon any other commodity. 7 T. R. 210.

244. Rice is not corn within the meaning of the memorandum. 2 N. R. 215.

245. Since the assured can only recover an average loss upon the articles contained in the usual memorandum, where the loss can be ascribed to the stranding, the declaration must be framed as for a loss by stranding. 4 T. R. 783.

246. Though

246. Though different parts of a cargo are capable of a distinct and several valuation, yet there cannot be a total loss as to one part only. 4 T. R. 783.

247. Where the subject matter of a valued policy, warranted free of particular average, is in its nature divisible, the assured may recover for a total loss of part. 15 East, 559.

248. Under a policy on goods free from particular average, the underwriters cannot be made liable, by abandonment, for a total loss, where the property wrecked is saved, however deteriorated. 16 East, 214.

249. Where any of the articles in the memorandum are thrown overboard, to preserve the health of the crew, likely to be impaired from deteriorated state, occasioned by a peril insured against, the loss is total. 5 B. & P. 474.

250. If a ship, warranted to sail on a day certain, gets under sail on the day, with intent to pursue her voyage, the warranty is complied with, though she should be obliged to put back instantly, by an embargo, before she gets out of the harbour. Dougl. 569.

251. A warranty in a policy of insurance, to sail on or before a particular day, means to sail equipped for the voyage, that is, complete, with her complement of men, clearances, &c. 5 M. & S. 456.

252. If a ship, warranted in a policy of insurance to sail on or before a particular day, and which means, "completely equipped for the voyage," leaves the place before the day, without her complement of men and clearances, meaning to get them at a port lying in her track, and the day appointed passes by without her having procured them, the warranty has not been complied with. 5 M. & S. 456.

253. A distinction is taken between a warranty "to sail," and a warranty "to depart," in a policy of insurance. The latter means, that the ship shall be out of port. 5 M. & S. 461.

254. On a warranty to sail from Jamaica on or before a day certain, if the ship departs from her port of loading on that day, with all her cargo and clearances on board, and proceeds to the place of rendezvous in the island, expecting to find a convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, though the captain knew of the embargo, when he sailed, the embargo being only till convoy should be ready. Dougl. 557.

255. A French ship being warranted to sail from Guadaloupe on or before a day certain, if she take in all her cargo and clearances, and leave her port of loading before the day, and sail to another part of the island, in the direct course of her voyage, merely in the hopes of joining convoy, and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain her beyond the day, and although it should be a condition inserted in one of her clearances, that she should pass that way to take the orders of government. Dougl. 561. Id. 566.

256. If a ship insured at and from Jamaica warranted to have sailed on or before a particular day (with a return of premium in case of convoy,) sail on or before the day from her port of lading, with all her cargo and clearances on board to the usual place of rendezvous at another part of the island, for the sake of joining convoy there ready, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. Cowp. 601.

257. If, in a policy of insurance at and from Surinam and all or any of the West India Islands to London, the ship is warranted to sail on or before the 1st of August, it is a sufficient compliance with the warranty, if she sail on or before that day from her final port of loading on the homeward voyage although she afterwards touch at one of the West India Islands to join convoy. 11 East, 515.

258. A ship was insured at and from Memel to England, warranted to depart on or before 15th September. Having taken in her cargo in the port of Memel, she got under weigh, with the intention of proceeding on her voyage on 9th September, with a prospect of favourable weather; but was obliged, by contrary winds, to come to an anchor near the mouth of the harbour, where she was detained till after the 15th. Held, that though this would have been a compliance with the warranty to sail by such a day, this warranty being to depart, which could only mean from the port of Memel, had not been complied with. 1 Mars. 570. 6 Taunt. 241. S. P. 5 M. & S. 461. 4 Campb. 84.

259. If, by a policy of insurance, the ship is warranted "free of capture and seizure in her port or ports of discharge," and she is taken in an open river, not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge, within the meaning of the policy. 15 East, 594.

260. If a ship insured is warranted free from capture and seizure in the port of discharge, and, being destined to Pillau, is seized while lying at anchor in Pillau roads, in order to discharge part of the cargo, to enable her to enter the harbour, this is not a seizure within the warranty. 1 Taunt. 517. Vide 4 Taunt. 387. 3 Camp. 205. Id. 206. 2 Camp. 541. 15 East, 594. 2 Camp. 615. s. 6.

261. A capture by a force issuing from the port of discharge, is an immaterial circumstance in construing a warranty against capture in the port of discharge. 3 Taunt. 499. 4 Taunt. 587.

262. A ship captured at anchor without the *caput portus*, in a place where ships do not unload, is not within a warranty free from capture in her port of destination. 4 Taunt. 660.

263. Where the very object of the policy requires discriminating knowledge of the coast on the part of the captain, there is an implied warranty that he possesses it. 14 East, 481.

264. Where a certain number of "seamen besides passengers," is specified in a warranty, the warranty is complied with, if there is the specified number, including boys. Dougl. 11.

265. A loss occasioned by a mob risen to reduce the price of provisions, is not within an exemption against losses by usurped power. 2 Wils. 565.

266. Where a ship warranted free from American condemnation was driven on the American shore; seized by that government; got off; and afterwards condemned, held that this was a loss by the peril excepted against. 12 East, 648.

267. If a ship warranted to sail on or before a particular day, be prevented from sailing on that day by an embargo, the warranty is not complied with. Comp. 784.

268. *Convoy*.—It is *prima facie* legal to sail from a foreign port without convoy, and the underwriter must shew that it was a part whence convoy is appointed, or where some one resides authorised to grant licences to sail without convoy; 4 Taunt. 495.

269. The convoy act only applies to a ship at first starting; not therefore on sailing again after having been compelled to put back by stress of weather. 5 Taunt. 49.

270. Where it is known to the assured of goods that the ship is to sail without convoy, the event of her being duly licensed will alone protect him. 4 Taunt. 178.

271. Where a person insures goods on board a ship which he knows is to sail without convoy, he is bound to see that she has a sufficient licence for the whole of the voyage. 2 Mars. 252. 6 Taunt. 544.

272. A bond previously given, pursuant to the statute, is requisite to legalise the proceeding without convoy from the port of clearance to the port of rendezvous. 5 Taunt. 151.

273. The operation of a licence to sail without convoy to an intermediate port cannot be carried further. 4 Taunt. 178.

274. An admiralty licence for a ship to go to X. without convoy is void, if the ship sail without any intention of going there. 15 East, 517. 4 Taunt. 178.

275. A warranty to sail with convoy means the usual convoy for the voyage, and not a mere departure with convoy. Dougl. 72.

276. The term "convoy for the voyage" means such a convoy as shall be appointed by government. 2 H. B. 551.

277. Where there is a warranty to depart from England with convoy, the voyages from the port at and from which the ship is insured to the port of convoy, and thence to the port of discharge, are considered distinct. 1 B. & P. 172.

278. Coming out of harbour on a signal and orders from a man-of-war, and sailing in the fleet for some time, and then taken, though unable to get sailing orders from the man-of-war, is sailing with convoy. Str. 1250.

279. On insurance of ship warranted to depart with convoy, she may go to the place appointed for the general convoy for that trade, at the hazard of the insurers. Str. 1265.

280. A ship does not depart with convoy unless she has sailing instructions on board on leaving the place of rendezvous, supposing that they might, with due diligence, have been obtained. 1 B. & P. 5. 2 B. & P. 164.

281. The st. 43 G. 3. c. 57., is not satisfied unless the convoy with which the ship sails is a convoy appointed for the voyage on which she is bound, or for so much thereof as convoy is appointed for; and unless the ship starts with convoy. 1 Taunt. 249.

282. An insurance is not avoided within st. 43 G. 3. c. 57., from the ship having sailed without convoy, unless the assured was privy thereto. 1 Taunt. 249. Id. 250. n.

283. An unforeseen separation from convoy is no breach of the warranty to sail with convoy. Dougl. 74. 271. 736.

284. The taking in goods after the convoy's signal to weigh does not vacate a policy on goods, if no delay is thereby occasioned. 12 East, 151.

285. The liberty to seek, join, and exchange convoy, is introduced for the benefit of the assured; and therefore, *semble*, any restraint imposed by them on the captain's option in this particular is immaterial. 1 M. & S. 4.

286. *Total Loss*. — If the voyage is lost, or not worth pursuing, if the salvage is high; if further expence is necessary; if the underwriter will not, at all events, undertake to pay that expence, the assured may abandon, notwithstanding a recapture. Dougl. 251.

287. A total loss is of two kinds: — 1st, Where the whole of the property insured perishes; 2d, Where the property, or some portion of it, exists, but the voyage is lost, or the expence of pursuing it exceeds the benefit arising from it; when the assured may abandon. 1 T. R. 608.

288. "Total loss" is a technical expression, and imports an utter loss of the property for the voyage, and no more; therefore, if the voyage has been performed, and the property has arrived in specie, however deteriorated, the loss, if any, is average, and not total. 1 T. R. 187.

289. If the salvage falls short of the freight, it is to be considered as a total loss. Str. 1065.

290. That the assured in a valued as well as in an open policy on goods, may recover as for a total loss, the whole subject matter intended to be recovered by the valuation in the policy, must have been lost. 15 East, 525.

291. If goods reach their place of destination, not in the ship in which they are insured, but in another, having been removed in consequence of one of the perils insured against, the loss is total. 2 M. & S. 574.

292. If a ship is lost just without the limits of the harbour of the place to which she is destined, so that the goods do not arrive in the ship, but are taken out and placed in other craft, the loss is total (as to the goods as well as ship). 2 M. & S. 574.

293. That the assured, in a valued as well as open policy on freight, may recover as for a total loss, the situation of things when the loss happened must have been such, that, had it not been for the loss, the entire freight contemplated at the time of insurance, and meant to be covered by the valuation, would have been earned. 15 East, 525.

294. The assured, in a valued policy on the freight of a chartered ship, is entitled to recover for a total loss, where the vessel, having taken in part of her cargo, and the remainder being ready on shore, is lost. 1 M. & S. 515.

295. A chartered ship is to take in goods at London or Maderia; there deliver such portion as an agent should direct; receive on board wine; proceed to Jamaica, and there deliver; 135*l*. to be paid for freight during the whole voyage from London to Maderia, and thence to Jamaica, payable in Maderia on delivery of the goods shipped at London for that place, by wine at so much per pipe, to be carried to Jamaica free of freight. She arrives at Maderia; delivers all her London cargo, except a certain portion retained as ballast; receives part of the Jamaica cargo, but not the freight wine; and then is lost. Held, that this was a total loss within a policy upon the freight at and from London to Jamaica, with liberty to touch at Maderia, and discharge and take goods on board there. 1 N. R. 256.

296. Shipowners insure ship and freight separately; the ship is detained by embargo; the owners abandon the ship to the insurers thereon; the ship is afterwards released from the embargo, and returns home; freight is earned and in part paid to the underwriters on the ship, upon an indemnity. The owners of the ship cannot recover against the insurers on the freight; for there is either no loss at all, or no loss within the policy, since the loss of the freight, if any, arises from the act of the owners themselves, in abandoning the ship to the insurers thereon. 1 Smith, 524. 5 East, 588.

297. A ship and goods being insured for a voyage, if the ship is taken and re-captured, and after the re-capture, the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured may abandon, and recover as for a total loss. Dougl. 251.

298. If a ship is taken, re-taken, and arrived in England before the insured offers to abandon, and is afterwards brought to the port of delivery, and has sustained no damage from the capture, not a total, but only an average loss, is recoverable. 2 B. M. 1198. 1 Blk. 276.

299. If a privateer is insured to cruise for three months and is taken by the enemy, re-taken before she is *infra presenciam hostis*, carried into a neutral port, and sentenced to be restored to the owners on paying salvage, yet is it a total loss. 1 Wils. 191.

300. Where the object of the voyage is lost, there is a total loss as to the cargo, though the ship is safe. 4 T. R. 785.

301. A loss of the voyage, with due notice of abandonment, operates as a total loss of the goods. 9 East, 285.

302. An insurance is made on goods, on board the ship S. at and from X. to Y., is an undertaking that the goods shall be transported in that ship to the place of destination. An accident, therefore, which incapacitates the ship from performing the voyage, occasions a total loss of the goods, within the meaning of the policy. But as no specific voyage is insured, it follows that a mere retardation of the adventure, a loss of the voyage for that season only, will not constitute a total loss; the ship may be refitted, and proceed next season. 2 M. & S. 240.

303. A loss of the voyage is not a loss of the ship, within the meaning of a policy of insurance on ship at and from X. to Y. 2 M. & S. 290.

304. The mere loss of the voyage is not a loss of the ship. 2 Taunt. 365.

305. If property insured reaches the assured at the place appointed, though in a deteriorated state, the loss is average only, and not total. 2 M. & S. 371.

306. Where a ship was stranded, and the cargo, consisting of hogsheads of sugar, has all got ashore, each hogshead containing some sugar, though but little, and nearly all damaged; held, that the jury were warranted in finding this to have been an average loss only. 2 Mars. 452. 7 Taunt. 154.

307. A neutral, proceeding from her own to X., in the enemy's country, is brought into an English port. Pending proceedings in the Admiralty, the king declares X. in a state of blockade. Held, that this was a total loss of the voyage. 9 East, 285.

308. Where the captain, learning that if he enter the port of his destination, the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated; the assured on goods cannot abandon as a total loss. 5 B. & P. 388.

309. The consignee of a captured cargo was allowed to retain the amount of his acceptances. Held that the assured, not having abandoned, might consider the loss partial, and, therefore, that what was saved was saved for his benefit. 4 Taunt. 805.

310. If property insured be taken and condemned as prize, the underwriters are liable, though no claim was made by the assured. 3 T. R. 477.

311. An assured, by doing what is most for the interest of all concerned, with the property saved, does not thereby preclude himself recovering for a total loss, if otherwise entitled. 1 T. R. 611. n. (a).

312. The sentence of a court of appeal reversing a condemnation under which the property insured had been landed and sold, and decreeing restitution, or the value, does not make the loss partial. 15 East, 504.

313. If after the total loss of a ship insured, and after an abandonment to the underwriters, which they refuse to accept, the ship is restored before action brought; but, nevertheless, under such circumstances that there is no medium by which the extent of the loss, as an average one, can be estimated, the right which the abandonment conferred, is not divested, and the assured is entitled to recover as for a total loss. And even though no abandonment had been made, such circumstances would have authorised one. So that it seems, that to prevent the restoration of the property divesting the right conferred by abandonment, its state must be such as to authorise a present abandonment. 4 M. & S. 576.

314. *Semble*, that abandonment made during a total loss, will not, without acceptance, be entitled to recover for such, where the loss ceased to be total at the time of action brought. 10 East, 529.

315. Whether the assured of a ship can recover as for a total loss, must depend upon the state of things at the time of action brought, unless the underwriter had accepted the abandonment duly made. If a ship insured is captured, and, whilst in the enemy's possession, is abandoned to the underwriter, who refuses to accept it, and afterwards, and before action brought, is re-captured and restored to the assured, he cannot recover as for a total loss. A contract of insurance is a contract to indemnify the assured from any loss he may sustain: to allow him to recover as lost that which is not lost, would be giving him more than an indemnity. 4 M. & S. 595.

316. Where a ship seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him. 1 Mars. 425. 6 Taunt. 25.

317. Where there is ultimately a total loss from one of the perils excepted against, the assured cannot recover for a previous deterioration of the subject from a peril insured against. Though he may for disbursements made in consequence thereof. 12 East, 648.

318. *Average loss*. — Insurers are liable to pay the charge of a compromise *bonâ fide* made to prevent the ship from being condemned as lawful prize, or to avoid a greater expence. 1 Blk. 315.

319. Money paid by the master for the ransom of the ship, contrary to 45 Geo. 3. c. 72., cannot be recovered as an average loss. 2 Taunt. 363.

320. An average loss on a valued policy, must be estimated by the real value of the goods on board. 1 Blk. 279.

321. It is the usage, that where the underwriters are chargeable for the repairs of a ship, the exchange having been new work for old, a deduction of one third must be taken off. This only obtains where the ship comes to the owner again; not, therefore, where she is obliged to be sold by default of the underwriters. 2 T. R. 407.

322. Where underwriters desire that a ship, which the assured is entitled to abandon, may be repaired at their expense, whereupon money for repairs is taken up on a bottomry bond; to discharge which, the underwriters having refused to pay it, the ship is afterwards sold, they are liable for whatever loss the assured may sustain in consequence of such refusal; and a refusal by one is a refusal by all, since they were acting in a body. 2 T. R. 407.

323. *Abandonment.*—The assured is in no case bound to abandon; he has always an option, where the property, or any part of it, exists in specie, whether he will abandon or not. 1 T. R. 615.

324. Upon the happening of such a peril, suspending the voyage, and including the necessity of repair to such an extent as entitles the assured to consider the loss total, abandonment is necessary. 14 East, 465.

325. Abandonment is only necessary to make a constructive total loss. 15 East, 13.

326. The wreck and deterioration of the goods cannot be considered a total loss, without abandonment. 15 East, 559.

327. Freight is insured from A. to B.: the ship sails, but is obliged to put back from stress of weather when she is found to be incapable of complete repair, and the cargo is accordingly unloaded, and the ship sold. In an action on the policy for a total loss, held, that there was no necessity for an abandonment of the freight, but that the insured was bound to use all reasonable endeavours to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage. 1 Mars. 447. 6 Taunt. 68.

328. An assured can only abandon where there has been a total loss of the property insured. 1 T. R. 187.

329. On a wagering policy there can be no abandonment, since there is nothing to abandon. 1 T. R. 304.

330. A temporary capture is a loss that the assured may abandon. If he delays, and the ship is restored, he cannot; so that if she afterwards founders, he cannot declare as for a loss by capture. 1 T. R. 308.

331. Where the ship is not worth repairing the assured may abandon. 2 T. R. 412.

332. The loss of the voyage entitles the assured on ship to abandon. 6 T. R. 413.

333. An embargo, after the risk has attached, though not by an enemy, which stays the voyage, entitles the assured to abandon as for a total loss. 6 T. R. 413.

334. An embargo by an alien's own government does not entitle him to abandon. 10 East, 536.

335. Where an abandonment is requisite it must be made as soon after news of the loss has reached the assured as possible. If he delays making it, though with a good intention, he can only consider the loss as average. 1 T. R. 608.

336. Corn was insured free from average, unless general, from Waterford to Liverpool. The vessel was run on shore at Waterford on 28th of January, and was wholly under water at high water. Part of the corn was taken out by the insurers, and kiln-dried, and the assured received the net produce. On the 18th of February, (twenty-four days after the loss,) the assured gave notice of the abandonment, which the insurers refused to accept. Held, that the notice of abandonment was too late to entitle the assured to recover as for a total loss. 3 Smith, 48. 7 East, 38.

337. The assured, on receiving intelligence of such a loss as entitles him to abandon, must make his election to abandon, and give notice thereof to the underwriters within a reasonable time, else the loss, on eventually proving partial, cannot be made total. 9 East, 285. 13 East, 304.

338. The insured is entitled to a reasonable time for examining into the state of a damaged cargo, before he makes his election on the question of abandonment. 2 Mars. 98. 6 Taunt. 385.

339. Abandonment not accepted cannot convert to a total loss what at the time of abandoning had in fact ceased to be such. 10 East, 329. 2 Taunt. 365.

340. An ineffectual notice of abandonment will not preclude the assured recovering for a total loss, where the loss is total. 15 East, 13.

341. Where ship and freight are abandoned, in consequence of an embargo, to the respective underwriters, and the abandonment is accepted, and subscription paid by the under-

underwriter on freight, in consideration of the assured undertaking to assign to him all right of recovery, &c. in the freight, the assured is precluded by this agreement from afterwards setting up, as between himself and the underwriter, the right of the insurer on ship to the freight. 4 East, 54. 3 B. & P. 479.

342. If after an abandonment to the respective underwriters on ship and freight, and acceptance thereof, freight is earned, the underwriters on freight are not liable. 5 East, 388. 1 Smith, 524.

343. *Premium.* — Though, in a policy of insurance, it is always understood, and therefore tacitly agreed, that the policy-broker alone shall be liable to the underwriter for the premium; 12 East, 507. 4 Taunt. 246. this tacit agreement supposes that all is fair on the side of the assured, and the transaction a dealing in the common course of business; for if there has been any fraud or mal-practice, the underwriter may require him to pay the premium; as where the assured knew that the broker was insolvent, and furnished him with means of passing off for a man of credit; 3 Taunt. 493. or where he procured the insurance to recover a debt from the broker to himself, setting the premium against the debt. 3 Taunt. 497.

344. In all cases where the risk never has begun, there shall be a return of premium. Dougl. 588. 798. 3 Burr. 1257. 1 Blk. 515. Cowp. 668.

345. Misrepresentation, without fraud vacating a policy, entitles the assured to a return of premium. 4 Taunt. 640.

346. Where the assured fails from an exception in the policy, express or implied, there can be no return of premium. 1 M. & S. 35.

347. Where the very object of the policy requires discriminating knowledge of the coast, on the part of the captain, and the underwriter is discharged from the want of it, there can be no return of premium. 14 East, 481.

348. Though a verdict for the defendant, on the ground that the risk never commenced, does not necessarily imply that the plaintiff is entitled to a return of premium; and, though the plaintiff has not mentioned it in his opening, yet is he entitled to it where there is a count adapted. 2 B. & P. 350.

349. Where the policy contains two distinct risks, and two voyages, and one risk only has begun; there shall be an apportionment of the premium. 3 Burr. 1257. 1 Blk. Rep. 315. 1 B. & P. 172.

350. When a ship is insured against capture for twelve months, at the rate of so much per month, making a specified gross sum, though the risk cease before the end of two months, by the loss of the ship in a storm, there shall be no apportionment nor return of premium, the contract being entire. Dougl. 585.

351. If a ship is insured for twelve months, at a gross sum, warranted free from capture, there shall be no apportionment nor return, though the risk cease by the capture of the ship, before the expiration of the twelve months. Dougl. 587.

352. If the policy is at and from London to Halifax, in Nova Scotia, warranted to depart with convoy from Portsmouth, the risk and contract are divisible; and if the ship depart from Portsmouth without convoy, there shall be an apportionment and return of so much as was paid for the voyage from Portsmouth to Halifax, to be ascertained by the jury, the commencement of any risk from Portsmouth depending on a condition precedent of a departure from thence with convoy. Dougl. 587. 786. 790.

353. If there is an insurance on ship and goods, at and from A. to B. during her stay and trade there, at and from thence to her port or ports of discharge in C., and at and from thence back to it, it is an entire contract; and if the loss happen at any time after the commencement of the risk, there shall be no apportionment or return. Dougl. 781.

354. If a policy is at and from A., warranted to sail on a day certain; the risk and contract are divisible; the risk from A. depending on a condition precedent of a departure on the day; and if there is no departure on the day, there shall be an apportionment and return. Dougl. 785.

355. Upon a policy, at and from such a port, to any other port or place whatsoever, for twelve months, at 9*l.* per cent., warranted free from capture, the risk is entire; and, therefore, if once begun, there shall be no return of premium. Cowp. 666.

356. Wherever the risk has once begun, though it cease immediately afterwards, there shall be no apportionment of return of premium. Cowp. 668. Dougl. 588. 789.

357. An insurance being made, without interest, and the premium paid, the insured shall not recover it back. Dougl. 468.

358. If A., of his own accord, insures on behalf of B., who afterwards refuses to adopt the policy, A. cannot recover back the premium from the underwriter. The grounds

grounds for such claim are, that the policy was without interest; but these fail, since the party for whom it was made had an interest. 2 M. & S. 485.

359. A premium given for a re-assurance, illegal under st. 19 Geo. 2. c. 37. cannot be recovered back. 5 T. R. 266.

360. If a ship engaged on an illegal voyage is insured, and so the insurance void, the assured is not entitled to a return of premium (upon the ground that the risk did not attach) though the fact of the illegality does not appear upon the face of the policy. 4 M. & S. 16.

361. Though an insurance of an alien's property, under ignorance of hostilities having commenced by his government, is void, yet the English agent is entitled to a return of premium. 12 East, 225.

362. Where the policy is avoided by an alteration by the assured, the premium cannot be recovered back. 4 Taunt. 530.

363. An arrival of the ship entitles to the stipulated return of premium, notwithstanding a capture, re-capture, and payment of salvage during the voyage. 7 T. R. 421.

364. Where the return of premium is to be more or less, according as the ship sails with convoy for longer or shorter portions of the voyage, a clause added after the last stipulation for a return, of "and arrived," is a condition annexed to all the rest. 4 East, 396. 1 Smith, 72.

365. Where part of the premium is to be returned, "if the ship sails with convoy and arrives," she need not arrive in company with the convoy. Dougl. 268.

366. In a policy on goods shipped on board a certain ship, to return part of the premium "if sails with convoy and arrives," the arrival of the ship is what is meant, and the full return is to be made on the whole sum insured, though there should be an average loss on the goods. Dougl. 268.

367. Where, in an insurance on ship from Oporto, there is to be a return of premium, if she sail with convoy, "from the coast of Portugal," (or what is equivalent, depart,) sailing from Oporto with a convoy bound to touch at Lisbon to take up the trade there, entitles to a return. 2 B. & P. 111.

368. *Suit*. — If a ship insured is sold with the policy, the vendee cannot sue thereon. 5 East, 395.

369. An insurance broker, who effects a policy in his own name, though on account of his principal, may, if he has a lien upon the policies, or, if he has paid his principal, maintain an action in his own name. In the latter case, the suit is on his own account, and exempt from the controul of the principal. By subscribing to a policy in the broker's name, the underwriter consents that he should be at liberty to stand in the character and situation of principal, that in case of loss he should be entitled to act in all respects as his creditors, and that he should be considered as giving him credit upon the policy, as his own risk and on his own account. 2 M. & S. 118.

370. An insurance broker who effects a policy, not in his own name, but in the name of his principal, can in no event sue thereon in his own name, not though he may have a lien upon the policy; or may have paid his principal for a loss thereon, as where he act under common *del cred*. The underwriter has not consented that he should in any case be entitled to stand as principal, or to be treated as the creditor; nor has he ever agreed that he should be considered as giving him credit at his own risk and on his own account. The guaranteeing the broker of his solvency to the assured on the policy, is a transaction to which he is wholly a stranger. 2 M. & S. 119.

371. An agent who effects a policy of insurance in his own name, may, if he has a lien upon the policy, sue thereon in his own name. 2 M. & S. 425.

372. An agent to whom a cargo is consigned, and who will have a lien upon the cargo in respect of monies advanced, or bills accepted on the credit of the consignment, has a sufficient interest in the cargo to enable him to insure it in his own name. He may therefore, on a loss happening, sue upon the policy in his own name, that is, not merely as agent for the consignors, but as a party interested, and upon the same principle may set off the loss in an action by the underwriter against him. The same rule holds where the agent has a *del credere* commission. And a dissent by the owner, that the agent shall sue or set off, will not avail, since he is asserting, not his principal's right, but his own. 2 M. & S. 423.

373. A policy-broker, in whose name an insurance has been made on another's behalf, may sue thereon. 1 H. Bl. 81.

374. A declaration on a policy on interest must aver in whom the interest resides. 3 Taunt. 515.

375. A declaration that the plaintiffs A. and B. caused to be effected a policy. containing



taining that C. and Co. did make assurance, and averring the interest in D., is unobjectionable after verdict. 15 East, 4.

376. Where particular exceptions to a general risk are made by warranty, the assured, in declaring on a loss by the risk, need not negative the exceptions. 15 East, 288.

377. An averment that the plaintiffs were the persons residing in Great Britain, who received the order for and effected the insurance, must be proved. 1 M. & S. 201.

378. *Quare*, whether, in alleging a loss on the high seas, it be necessary to add a venue? 2 B. & P. 153.

379. Where the insurance is on a particular species of goods, an averment that divers goods were put on board, is made sufficiently definite by a subsequent allegation, that the insurance was made on the said goods. 2 N. R. 77.

380. *Semble*, that a declaration on a policy on goods should aver, that they were put on board at the loading place. 2 B. & P. 153.

381. The plaintiff declares on a policy from Jutland to Leith, and avers a loss by seizure. The captain states, that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway. The defendant produces a Swedish sentence of condemnation for breaking the blockade of Norway. Held, that though this was conclusive evidence that the blockade had been violated, yet it was not sufficient evidence to fix the captain with barratry; and *quare*, if it had, whether the plaintiff could have recovered without a count for barratry? 2 Mars. 72. 6 Taunt. 375.

382. The expences of salvage may be given in evidence, though the only special damage laid is, that the goods were spoiled by the ship's sinking. B. R. II. 304.

383. In a declaration on a policy signed by an agent, plaintiff need not lay different counts, one as signed by principal, and another as signed by agent. 2 Burr. 1188.

384. In an action for loss by barratry in the master, objected by defendant that the plaintiff ought to prove that the master was not owner or freighter, and that he did not act under the direction of the person who was. Held, that if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant. 4 T. R. 53.

385. Where there is a stipulation in a policy on a foreign ship, that the policy shall be sufficient proof of interest, and there is judgment by default, the plaintiff, on the writ of inquiry, need only prove the defendant's subscription, without giving any evidence of interest. Dougl. 515.

386. The assured's agent, by handing over the captain's protest to the underwriter, does not make it evidence for him. 7 T. R. 158.

387. If a ship is insured, except as to captures and seizures, and four years afterwards has never been heard of, it shall be deemed sufficient evidence that she foundered. Str. 1199.

388. Where there has been only an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of parties, may find for a total loss, the plaintiff entering into a rule to account to the underwriters for what part of the insured property he shall recover. Dougl. 294.

389. A statement in a case reserved, that the insurance was on account of the captors, was held to preclude the consideration, whether a count, averring the interest to be in the crown, and the insurance made on account of his majesty, could be sustained. 11 East, 428.

390. *Adjustment*.—Adjustment and return of premium, under a mistaken belief that a ship was taken in a port warranted free of capture, does not bar an action for the total loss, the capture having happened out of the port. 4 Taunt. 725.

391. *Double insurance*.—Double insurance is where the same man is to receive two sums instead of one, or the same sums twice over for the same loss, by reason of his having made two insurances on the same goods or ships; but every case where there are two insurances is not a double insurance. 1 B. M. 489. 1 Blk. 105.

392. Upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to make the other insurers contributory. 1 Blk. 416.

393. *Reciprocal insurance*.—In mutual insurances all parties must be contributory. 3 Burr. 1512.

394. *Re-assurance*.—It seems that an agreement between two underwriters, that the subscription to a policy by one shall be considered as transferred to the other, is not a re-assurance within st. 19 Geo. 3. c. 37. s. 4. unless the premium paid to the second underwriter is less than what the first received. 1 Taunt. 48.

395. The

395. The st. 19 Geo. 2. c. 37. s. 4., providing that it shall not be lawful to make re-assurance, unless the assured be insolvent, become a bankrupt, or die, extends to every re-assurance made in this country, whether by British subjects or foreigners, on British or foreign ships. 2 T. R. 161.

396. *Partnership*. — An agreement between two, that whatever profits may arise upon policies to be underwritten by one, shall be shared between them, constitutes an illegal partnership, within st. 6 Geo. 1. c. 78. s. 18. 1 Taunt. 6.

397. *Application of a general insurance*. — An insurance on "ship or ships," or "on board ship or ships" generally, may be applied by the assured to any ship he thinks fit, within the terms of it; therefore, to one that is lost, though another answering the description in the assurance arrives. 2 H. B. 345. Id. 345.

398. A policy made by the consignee for the benefit of the consignor, though in the consignee's name, and as interest might appear, cannot be applied to cover the consignee's separate interest in respect of advances. 10 East, 365.

399. A bailee, who has undertaken to insure, may apply an insurance effected by him in general terms, to his own property, in exclusion of that bailed. 1 Taunt. 137.

400. *Assured*. — In a wagering policy on ship, the assured places himself in the situation of ship-owner, and undertakes to do every thing which the owner himself might perform. 1 T. R. 304.

401. *Agent*. — As to the duty of an agent in insuring. Cowp. 479.

402. The ship's husband has no right to insure for any part owner, without his particular direction, nor for all the owners in general, without a general direction, or something equivalent to it. 5 Burr. 2727.

403. Informing the broker that property insured in time of war is neutral, sufficiently indicates that the party, though insuring in his own name, is only an agent. 1 East, 355.

404. By 28 Geo. 3. c. 56., repealing 25 Geo. 3. c. 44., every policy shall contain the name, or style, and firm, either of one or more of the persons interested, or of the consignor or consignee, or of the resident in Great Britain, receiving the order for or effecting it, or of the person directing the agent immediately employed to effect it.

405. Under the st. 25 Geo. 3. c. 44. (since repealed by st. 28 Geo. 3. c. 56.) it was necessary that the name of an agent effecting an insurance for his principal resident abroad, should be inserted in the policy, *eo nomine*, as agent. And, *semble*, it was also requisite that such agent should reside in England. 1 T. R. 313. Id. 464.

406. A policy effected by an agent may or may not describe him, though a special agent, as agent. 1 B. & P. 345. Id. 346.

407. An insurance agent is not liable for neglect, where the insurance was illegal. 7 T. R. 157.

408. An insurance made by a captor, (himself having no insurable interest,) as agent, without any declaration as to the party interested, must be taken as on account of, and may be adopted by the crown. 15 East. 274.

409. If one man makes a contract expressly for another, though the one be not the other's agent, express or implied, (implied, as where he is his general agent,) the latter may adopt the contract. Thus, where A. insures as well in his own name as, &c. and the interest is in B., B. may sue for a loss. 2 M. & S. 485.

410. A., the captain of a ship, having incurred expences on her account, draws a bill on his owner, in payment, with a memorandum, "that if it should not be honoured, the holder would insure the amount, and place the premium, &c. to the ship's and A.'s account." The bill is indorsed to B., and by him presented for acceptance, but dishonoured; and B. then effects an insurance, the interest being declared to be on the bill. In an action by B. against A. for the premium expences, held, that B. was justified in effecting the insurance as for time, instead of on the voyage, and that, whether the insurance were void or not, as between the insured and the underwriters, B. was at all events entitled to recover the expences incurred by him. 1 Mars. 556. 6 Taunt. 234.

411. *Broker*. — Whilst the agency of the broker subsists in the usual manner, the underwriter cannot recover from him the premiums, without allowing for returns to which, by events, the assured has become entitled. 12 East, 507.

412. An insurance-broker cannot set off returns of premiums against premiums due from himself to the underwriter. 4 Taunt. 541.

413. In an action by the executors of an underwriter against a broker for premiums due on policies subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death. 2 Mars. 138. 6 Taunt. 448. 2 Mars. 141. 6 Taunt. 451.

414. An insurance-broker who debits an underwriter with a loss, and takes his acceptance for a protracted payment of the balance of account between them, is liable to the assured for money had and received. 6 Taunt. 110.

415. A., at Malaga, directs his broker in London, "to insure goods supplied on board the Pearl from Gibraltar to Dublin," adding that "he will take the risk upon himself from Malaga to Gibraltar Bay, where he shall send a letter on shore." Held, that taking the whole instructions together, the broker should have stated in the policy that the goods were loaded at Malaga, and should have effected the insurance at and from Gibraltar Bay, and not at and from Gibraltar. 2 Mars. 189. 6 Taunt. 495.

416. A person employed by ship-owners as their agent, effects a policy of insurance, and represents himself as the principal to the brokers, who cause such insurance to be effected. Held, that if the brokers receive the amount of the loss from the underwriters, and pay it over to the agent, they are not liable to the owners in an action for money had and received, although part of the money was paid to the agent, after they were informed of his having acted in that capacity. 1 Moore, 155.

417. A broker has no lien for his balance against the insured, if he knows at the time that he is only an agent. 2 East, 525.

418. Where an insurance is discovered to be void, from the broker having suppressed a material communication, the assured is not bound in favour of the broker, responsible to him for the consequences, to resist refunding subscriptions paid to him by underwriters, under a mistaken supposition of liability. 5 Taunt. 615.

419. *Underwriter*.—An indemnification of the assured from whatever quarter, enures to the advantage of the insurer. 9 East, 72.

420. Where freighters insure against a payment covenanted for, in case a return-cargo cannot be had, the underwriter is entitled to the advantage of any deduction which the assured are entitled to make. 11 East, 232. 2 Taunt. 285. 12 East, 494.

421. The insurer, after satisfaction made to the assured, stands in his place as to the goods, salvage, and restitution, and is entitled to a share of prizes taken by virtue of letters of reprisal. 1 Ves. s. 98.

422. If a ship insured is taken, re-taken, and, no person appearing to give security, condemned and sold, the moiety paid the re-captors, and the other moiety remains with the officers of the court, and the assured recovers on the policy; chancery will not restrain him proceeding for the whole, if he offers to relinquish the salvage to the insurer. 3 Atk. 195.

423. Satisfaction having been made under a royal commission for distribution of prizes to the insured; such of the insurers as had paid were held entitled to restitution, though foreigners; but not those who had compounded and renounced salvage. 1 Eden. 150.

424. A restoration, after confiscation of half the proceeds, though exceeding the full valuation in the policy, gives the underwriter no right to recover back *50l. per cent.* paid by him on account, without any abandonment. 12 East, 488.

425. Where the loss is the subject of general average, the underwriter is entitled to the advantage of freight, being contributory, where the policy is on the whole or only part of the voyage, and though the contingency on which the freight was payable was not to happen during the period of the insurance. 1 M. & S. 518.

426. An underwriter, who has insured a freighter against a sum payable in a certain event, cannot insist on the freighter's right to a deduction, in opposition to the judgment of a court of law. 12 East, 494.

427. In many cases the liability of the underwriter is not limited by the amount of his subscription. 12 East, 655. 4 Taunt. 567.

428. *Land-carriage insurance*.—It seems, that an insurance on goods by land-carriage, without more, will cover damage arising from miscarriage. For such must necessarily have been in the contemplation of the parties. At all events, if the word "*baratry*" is used, that includes every species of fraud, or *malus dolus*, committed by the waggoner or servants, taking them, (for the term is one applicable to the sea,) to stand exactly as master and mariners. 2 M. & S. 172.

429. There is a policy of insurance upon goods at and from London, by land-carriage, to Harwich, and at and from thence by a packet to Gottenburgh, beginning the adventure upon the said goods from the loading thereof aboard the said ship. It is contended, that by the rule that a loading at Harwich is requisite, that the insurance on the sea risk may attach; by the same rule, a loading at London, that the land risk may commence, is necessary. Held, that the terms of the policy did not require it. By "*land-carriage*" is meant, from the time the goods are put into the charge of the carrier. 2 M. & S. 172.

430. *Fire insurance*.—A policy from half-year to half-year is made on the following terms: On expiration of the half-year no insurance is to take place until the next half-yearly premium is paid; which payment is to be made within fifteen days after the half-year, and "so long as the insurers shall agree to accept the same." Held, that the

(E 10.) What remedy upon a policy of assurance.

By the st. 43 El. 12. the chancellor annually, or oftener, may grant a standing commission to the judge of the Admiralty, recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, who may examine, and decree all causes concerning policies of assurance, which shall be entered within the office of assurance, within the city of London, in a summary course, without formality of pleadings.

And the commissioners shall meet weekly, and take no fee for execution of the commission.

the assured is uninsured between the expiration of the half-year and payment of the premium, so that the insurers are not liable for a loss in the interim, and cannot be made so by a tender and refusal of the premium after the loss, though within the fifteen days. 5 T. R. 695. 1 B. & P. 471. 3 Anst. 707.

451. A policy was made for a year, in writing, with an article, that on bespeaking policies, all persons are to make a deposit for the policy, &c. and shall pay the premium to the next quarter-day, and from thence for one year more at the least; and shall, as long as the insurers agree to accept the same, make all future payments annually within fifteen days, after the day limited in their respective policies, upon pain of forfeiture of the benefit thereof; and no insurance to take place till the premium be actually paid; but this was explained by an advertisement, that the office considered all persons insured by policies for a year or more, as insured for fifteen days beyond the expiration of their policies. Held, that the fifteen days are allowed only in case it is intended to renew the policy; and that if the office give notice, before or during the fifteen days, that they will not accept the premium, and a loss happens afterwards during the fifteen days, the office is not liable. 2 Smith, 646. 6 East, 571.

452. Policy of insurance against fire on a manufactory:—From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room, and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been, had there been free vent from the smoke and heat. This held not to be a loss within the policy. 6 Taunt. 456. 2 Mars. 130.

453. A. abroad, having two warehouses, writes to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire upon that evening, and that there was danger of the fire again breaking out; and sends his letter after the regular post time. The fire having broken out again on the day next but one following, and consumed A.'s warehouse, held, that the concealment, though not fraudulent, was material. 2 Mars. 46. 6 Taunt. 558.

454. *Life insurance.*—If a man whose life has been insured up to a certain day, die after the day of a wound received pending the insurance, the insurer is not liable. 1 T. R. 260.

455. The term "disorder tending to shorten life," in a life-insurance policy, is confined to diseases which usually have that tendency. 4 Taunt. 765.

456. A member of a life-insurance company for the benefit of widows, insures for an annuity for his widow. The conditions are;—If he should pay a quarterly premium on the quarter-days, during his life, and if he should also pay his proportion of contributions which the members of the society should, during his life, be called on to make to supply a deficiency of funds. By rules of the society, if any member neglect to pay up the quarterly premium for fifteen days after due, the policy was void, unless the member, continuing in as good health as when the policy expired, paid up the arrears within six months, with an addition. An arrear cannot be tendered by the widow, though within the fifteen days. 12 East, 185.

457. The condition of a life-insurance required that their should be no misrepresentation or reservation. The assured was described to the assurers, as resident at Fisherton, not disclosing that she was in gaol there. Held, that it was a question for the jury whether the imprisonment was a fact material to be disclosed to the insurers. 3 Taunt. 186.

458. An insurance by a creditor upon the life of his debtor, is not prohibited by 14 Geo. 3. c. 48.

And may summon the parties, examine witnesses on oath, and commit any who disobey their final decree.

By the st. 13 & 14 Car. 2. 23. the commission may authorise them, or any three of them, *quorum* a doctor of law, or barrister of five years standing to be one, to meet and make a court: and they may punish contempt of witnesses on first summons, and parties on second summons, by imprisonment and costs: and any commissioner may examine a witness going to sea, giving notice, &c.

And commissioners may pass a final decree and execution against body or goods, against executor or administrator, and give costs.

But by the st. 43 El. 12 and 13 & 14 Car. 2. 23. a party aggrieved satisfying the decree, or depositing the money awarded, may in two months exhibit a bill in Chancery for re-examination of the decree; and the chancellor, if he affirm it, shall give double costs.

And if the commissioners decree the bill *pro confesso* upon the first summons without proof of the bill, Chancery upon appeal will reverse it. 1 Ver. 223.

Vide, action upon the case upon *assumpsit*.

## (F) Payment.

### (F 1.) *In pecuniâ numerata.*

Payment by a merchant shall be made in money, or by bill. Ma. 70.

### (F 2.) By bill obligatory.

Payment by bill is by bill of debt, bill of credit, or bill of exchange. Ma. 70, 71.

A bill of debt, or bill obligatory, is, when a merchant by his writing acknowledges himself in debt to another, in such a sum to be paid at such a day, and subscribes it at a day and place certain. Ma. 74.

Sometimes a seal is put to it. Ibid.

But such bill binds by the custom of merchants without seal, witness, or delivery. Ma. 72. 74.

So, it may be made payable to bearer. Ma. 71, 72. 74.

And upon demand. Ma. 72. 74.

So, it is sufficient, if it be made and subscribed by the merchant's servant. Ma. 72.

So, a bill of debt to a person certain may be assigned to another *toties quoties*. Ma. 71.

If a bill be signed by two or more as principals, each is bound by the custom of merchants only for his part. Ma. 75.

So, though one or more subscribe the bill of another as principals. Ibid.

But, if the words are, *nos et quilibet nostrum in solidum*, each is bound for the whole. Ibid.

Or, if they subscribe as sureties. Ibid.

Or, with a renunciation of privilege, &c. Ibid.

And now, by the st. 3 & 4 Ann. 9. all notes in writing made and signed by any person, or the servant or agent of any corporation, banker, merchant, or trader usually intrusted to sign such notes, whereby he promises to pay to any or order, or to bearer, any sum of money, the same shall be construed to be due to him to whom made payable.

And

And such note payable to any or order, shall be assignable or indorsible over as an inland bill of exchange.

And the party to whom the note is payable may maintain an action, as on an inland bill of exchange, against him, who or whose servant, or agent signed the same.

And he, to whom a note, payable to any or order, is indorsed, may maintain an action against him, who or whose servant, or agent signed the same, or against any who indorsed the same, as in case of inland bills of exchange.

### (F 3.) Bill of credit.

A bill of credit is, when a merchant sends a letter by a servant or agent to another merchant, within the realm, or in foreign parts, whereby he desires him to give credit to the bearer for goods or money, to such a value. Mar. 36. Ma. 71. 76.

So, he may give a general letter of credit to all merchants or others, for all monies delivered to such a one, within such a time: and thereupon shall be liable for all monies advanced to such agent. Mar. 36. Ma. 71.

And if his agent draw a bill of exchange upon his master for monies advanced upon such letter of credit, the master shall be liable without his acceptance, or though he refuses to accept. Mar. 36. Ma. 272.

### (F 4.) Bill of exchange. By whom it may be made.

So payment may be made by a bill of exchange.

A bill of exchange is, when a man takes money in one country or city upon exchange, and draws a bill, whereby he directs a person in another country or city to pay so much to A. or order for value received of B., and subscribes it. Ma. 270. Mar. 1. 2.

And therefore, generally, there are four parties to a bill of exchange: 1. The deliverer, who gives the money upon exchange: 2. The drawer, who makes and subscribes the bill: 3. The acceptor, to whom the bill is directed, and who is to accept and pay it: 4. The person to whom the bill is payable. Mar. 2.

Or, three parties are sufficient: as, if the drawer directs the bill to the acceptor to be paid to B., for value received of himself. Mar. 3.

Or, two parties: as, if the drawer makes a bill to A., to be paid to himself or order, for value of himself. Mar. 3. 1 Sal. 130.

And a bill of exchange may be by one merchant upon another, in a foreign kingdom. Mar. 2.

Or, upon another, in the same kingdom; and such inland bill is of the same effect as an outland. Mar. 2.

So, if any, not a merchant, make a bill of exchange, he shall be bound by it, according to the usage among merchants. R. 2 Vent. 295. 310. Sho. 125.

So, if one, two, or three bills of the same tenor are made, a stranger may sign the third bill with the drawer, and shall be bound thereby as surety for the drawer. Ma. 271.

### (F 5.) In what manner.

The usual form of a bill of exchange is, At six days sight pay to A.  
I 2 or

or assigns 100*l.* for value received of A., and put it to account, as per advice. Your friend, C. D.

To E. F., merchant, March 7.

The time of payment is mentioned so many days after delivery, or at usance, double or treble usance, which imports, one, two, or three kalendar monhs after the date, according to the usage of the place where the bill is made. Mar. 13. Ma. 268. 270.

Inland bills are usually directed to be paid so many days after sight or delivery to the acceptor. Mar. 13. 19. Ma. 268.

Bills of London to the Netherlands, Paris, &c. at usance, or one month after date. Mar. 13. 15. 18. Ma. 269.

Of London to Hamburg, at double usance, or two months. Ibid.

Of London to Venice, &c. or *à contra*, at treble usance, or three months. Mar. 13. 15. 19. Ma. 269.

The most safe direction of payment is, to such an one, by name, or order. Ma. 13, 14.

To such an one, or his assigns. Ibid.

So, it may be, to A. or bearer, though it be more perilous. Ma. 13.

To A. without more. Ma. 270.

So, one may direct a special manner of payment. Mar. 13.

May make two or three bills, and then shall say, pay this my first bill: this my second bill, the first not paid, &c. Mar. 7.

If the drawer makes himself debtor to him to whom it is directed, he says, put to my account. Mar. 7.

If he to whom directed be indebted to him, he says, and put it to your account. Ibid.

Or, he may say, place to account of A., &c. Ibid.

So, a bill may be directed within the same paper, or upon the back of it. Mar. 11.

But, a witness is not necessary to a bill of exchange. Mar. 14.

So, a bill to pay 300*l.* or surrender a person to prison, is not a bill of exchange; for the defendant has election to do the one or the other. R. in C. B. P. 12 Ann. *inter* Smith and Boheme. (Vide this case cited in 2 Ld. Ray. 1362. 1396. — Vide 2 Mod. Ca. 362.)

Or, to pay in three East India bonds. R. in C. B. (Vide 2 Ld. Ray. 1361.)

Or, to pay so much *per mensum* out of his growing subsistence. R. *cont.* in C. B. Tr. 12 Ann. *inter* Joscelin and Losier. But the judgment was afterwards reversed in B. R. *per* Parker, Powis, and Eyre, P. 1 Geo. (Vide this case cited in 2 Ld. Ray. 1362. and 1 Str. 591.) (p)

(p) 1. A bill of exchange drawn on a specific, and future uncertain fund, is not good as such. 3 Wils. 207. 2 Blk. 782. 2 Ld. Raym. 1561. Str. 591. 2 Ld. Raym. 1563.

2. An instrument in the form of a promissory note, payable on a contingency, is not a note within the stat. 3 & 4 Ann. c. 9.; but a special agreement, the consideration of which must be stated in declaring on it. 5 T.R. 482.

3. One test to decide whether a bill or note is payable at all events, is to consider whether a person intending to sue thereon, would have to inquire concerning an extrinsic fact, in order to determine whether he had a right to recover. 4 M. & S. 25.

4. If a note is not a promissory-note when made, no subsequent event can make it such. 2 B. & P. 413.

(F 6.) How it shall be accepted.

By the custom of merchants, he to whom a bill is payable, ought immediately after his receipt to present the bill to him, to whom it is directed, for his acceptance. Mar. 15.

Though a bill payable to himself for his own money. Mar. 16.

And it is safe to take a copy of a bill sent for acceptance. Mar. 10, 11.

When a bill is presented for acceptance, *ex rigore* he ought immediately to accept, or refuse; for he is not allowed three days for deliberation by the custom of merchants. Mar. 15.

5. A note or bill to pay a sum of money, "being a portion of a value as under, deposited in security for the payment hereof, according to the receipt in my hands, or for value deposited and registered," is a promissory-note, because it is payable at all events. 7 T. R. 733.

6. A promissory-note, to be such within the stat. of Ann. must contain an unconditional promise to pay money. If the payment is to be defeated upon a contingency, the note is not a promissory-note; as a note promising to pay a sum certain, being the amount of the purchase-money, for a quantity of fir belonging to Mr. H. and now lying in the parish of H. indorsed. "This note is given on condition, that if any dispute shall arise between Mr. H. and Lady W. respecting the fir, the note to be void." The money must be payable at all events. 4 M. & S. 25.

7. A promise to pay on the sale or produce, immediately when sold, of such an inn, and the goods, &c. is no note. 2 B. & P. 13.

8. A bill is good though not expressed to be for value received. *White v. Ledwick*. Bayley on Bills, 16. *Ld. Raym.* 1481. But *Str.* 1212, *contra*. *Vide Post.* 282. 4 Mod. 267. 1 Barn. 88. *Lutw.* 889. 1 Mod. Ent. 310. 1 Show. 497.

9. A bill to pay 9*l.* 10*s.* "as my quarterly half-pay to be due from June to September next, by advance," is a good bill. *Str.* 762. *Ld. Raym.* 1481.

10. A bill payable so many days after sight becomes due at the expiration of that time after acceptance or protest for non-acceptance. 6 T. R. 200. 2 H. B. 163.

11. Where a bill made payable after date, and no date is expressed, the computation must be from the day of delivering it. 3 B. & P. 175.

12. If by the terms of a note, the holder has the option of being paid either at the place where it was made, or "according to the course of exchange," between that place and another, he may insist upon being paid according to such course of exchange as exists between them at the time when the note becomes due; although at the time when the note was made there was a direct course, and at the time when it becomes due, there is no direct, but only a circuitous course of exchange between them. 3 B. & P. 335.

13. If a person signs or indorses his name upon a blank paper, stamped with a bill or note stamp, and delivers it to another person to draw such bill as he may choose thereon, he is the drawer of any bill to which the stamp is applicable which such person shall draw thereon. 1 H. & B. 315.

14. A bill of exchange issued in bank, the name of the payee may be filled up by any *bonâ fide* holder, with his own name, though not originally a party concerned. By leaving the blank, the drawer virtually empowers a *bonâ fide* holder to make the bill complete by inserting a name. 2 M. & S. 90.

15. A bill payable to a fictitious payee, is as against a party cognizant of the transaction, a bill payable to bearer. 1 H. B. 315. *Id.* 569. 3 T. R. 183.

16. If money is paid by A. into the hands of B. to be paid over to any one A. may appoint, it becomes the property of his appointee, who therefore may sue B. for money had and received. Upon this principle, the *bonâ fide* indorsee, for valuable consideration for a bill of exchange, payable to a fictitious payee, within the knowledge of the drawer and acceptor, may maintain an action of money had and received against the acceptor. He may likewise sue him for money paid to his use. 3 T. R. 174. *Id.* 182. 3 T. R. 481. 1 H. B. 569.

17. Where a bill is payable to the order of A., A. may sue, since, by claiming payment, he has made an order, namely, to himself. 5 East, 476. 2 Smith, 43.

18. An illegal consideration invalidates a note between the original parties. 1 Blk. 445.



Yet, twenty-four hours upon demand shall be allowed for consideration, if the post does not depart in the *interim*. Mar. 15, 16.

And a longer time is usually allowed where necessity does not prevent. Mar. 15, 16.

The usual acceptance is by subscribing his name. Mar. 16.

Or, a verbal acceptance, that it shall be accepted *crastino die*, &c. is sufficient. Mar. 16.

Though he afterwards refuse to accept at the day promised. Mar. 16.

But by the st. 9 & 10 W. 3. 17. and the st. 3 & 4 Ann. 9. every acceptance shall be by subscription, or indorsement of an inland bill.

So, if a bill be directed to A. and B., or either of them, an acceptance by either is sufficient. Mar. 16.

If he who ought to accept, loses the bill before acceptance, he must give security for payment, otherwise it shall be protested for non-acceptance, and also afterwards for non-payment. Mar. 29. 30.

So, a stranger may accept for the credit of the drawer. Mar. 21. 30.

And the acceptor cannot afterwards recall his acceptance. Mar. 20.

But an acceptance by a wife, or servant, does not bind the husband, or master, without authority by letter of attorney. Mar. 25.

Though they have authority by parol, or letter under his hand. Mar. 25.

Yet, usage of payment upon an acceptance by a wife or servant, will be evidence of a good authority to them. Mar. 25. 26. (q)

(F 7.)

(q) 1. *Presentment*. — A person who guarantees the payment of money to be paid by a bill, is entitled (though no party to the bill) to insist on the neglect to make a proper presentment, or to give due notice of the dishonour of such bill. 2 Taunt. 206.

2. One who for the honour of the payee accepts a foreign bill protested for non-acceptance, is not liable without a regular presentment to the drawee for payment, and protest on refusal. 16 East, 391.

3. The bankruptcy, or known insolvency of the drawee or maker, is no excuse for or neglect to make a presentment, or to give notice. 11 East, 114. 5 Taunt. 30. 16 East, 112.

4. Shutting up the counting-house at which a note is made payable, is equivalent to a refusal to pay, and dispenses with a presentment there. 16 East, 112.

5. Though a person who guarantees the payment of money to be paid by a bill, is entitled (though no party to the bill) to insist on the neglect to make a proper presentment, or to give due notice of the dishonour of such bill. 2 Taunt. 206. Yet proof, that before the bill became due, the parties liable thereon were bankrupt or insolvent, will be *prima facie* evidence that a demand upon them would have been of no avail; and, unless answered, will dispense with the necessity of making such presentment, or giving such notice. 8 East, 242.

6. If, on hearing of the acceptor's insolvency, the drawee gives the payee a check to pay over to the then holder, but which is not done until after the bill is due; this is not a dispensation of presentment. 2 B. & P. 277.

7. A bill payable after sight, must either be continued in circulation, or presented within a reasonable time. 2 H. B. 565. 7 Taunt. 397.

8. If a bill payable abroad at a certain time after sight, is taken in a course of negotiation, it is not necessary to send it by the first opportunity to the place where it is payable. 2 H. B. 565.

9. If a bill is payable in India sixty days after sight, it is not necessarily a neglect to omit presenting it for acceptance for twenty-six days after its arrival. 2 H. B. 1565.

10. Bills are drawn on 12th of May, by a house in London, on a house in Lisbon, payable thirty days after sight, and indorsed to A. in London, A. indorses them to B. at Paris. B., without presenting them for acceptance, puts them in circulation, and on

22d August, they are presented at Lisbon for acceptance, and dishonoured. Held, that B. was justified in circulating the bills without first presenting them for acceptance. 2 Mars. 454. 7 Taunt. 159.

11. A check payable on demand, need not be presented till the day following that on which it is given. 2 Taunt. 388.

12. A presentment, out of the hours of business, to a person of a particular description, a banker *e. gr.* in a place where, by the known usage, all persons of that description begin and leave off business at stated hours, is insufficient. 7 East, 385. 3 Smith, 358. 1 M. & S. 28.

13. *Semble*, that a presentment at a banking-house by a notary, with a view to protest, must be within the hours of business. 1 M. & S. 28.

14. Promissory-notes are, by the st. 3 & 4 Ann. c. 9., placed precisely upon the same footing as inland bills of exchange. Therefore, where three days grace are allowed upon the one, they likewise are upon the other. 4 T. R. 148. Even though the note is not negotiable. 6 T. R. 123.

15. A bill drawn on Leghorn, was not presented in time, owing to the political state of the country at that time, which rendered it impossible to prevent it. Held, that it being afterwards presented for payment with due diligence, and refused for want of presentation when due; the holder might recover against the antecedent parties; and evidence of this impossibility of presenting at the time of the maturity of the bill might be given on the ordinary averment that it was duly presented. 2 Smith, 223.

16. Sending a check to one's banker to obtain payment, is a negation; so that (being payable on demand,) the banker has till the day following that on which he received it, to present it. 2 Taunt. 388.

17. Where a person in London received a check upon a London banker, between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing house; the court held, that there had been no unreasonable delay, either by the holder in not presenting it for payment on the first day, (which he might have done,) or by his banker in presenting it at the clearing only, on the following day at noon. It being proved to be the usage, among such bankers, not to pay checks presented by one banker to another after four o'clock, but only to mark them if good, and to pay them the next day at the clearing house. 2 Taunt. 388.

18. It is no excuse for not having presented a note in time for payment, &c. that the defendant indorsed it to guarantee a debt from the maker; or that the defendant knew before it was due, that the maker could not pay it, and had desired a banker, at whose house it was made payable, to send it to him, and he would pay it. 2 H. B. 609.

19. A creditor on the 26th received a bill in payment, due the 28th; he forwarded it to his agent on the 29th, by whom it was duly forwarded for presentment. Held, that the creditor by such laches made the bill his own. 16 East, 248.

20. K. B. held that a presentment there is unnecessary. 13 East, 459. *Huffam v. Ellis*, in Dom. Proc. Bayley on Bills, 98. n. 3d edit.: accord C. B. hold that it is necessary. 2 Taunt. 61. 3 Taunt. 397. 1 Mars. 80. 5 Taunt. 344.

21. Naming a place of payment in the body of a note, renders a presentment there necessary. 14 East, 500. 16 East, 110. 3 M. & S. 150. 5 Taunt. 30.

22. If a promissory-note is made payable at a particular place, by a memorandum inserted, not in the body, but at the foot of the note, the memorandum forms no part of the contract, so that a presentment there is not necessary to complete the holder's right against the maker. 4 M. & S. 505.

23. If a bill or note is made payable at a banker's, it is sufficient to present it for payment at the banker's; and the banker is himself the holder, it is sufficient for him to see whether he has effects in hand. 2 H. B. 509.

24. Where an agent accepts a bill for his principal; who is then, and who continues abroad when it falls due, it must be presented for payment to the agent. 2 Taunt. 206.

25. From part payment of a bill after it has become due, without any objection being made for want of notice. 1 Taunt. 12. Or a promise to pay. 7 East. 321. The jury may presume that it has been properly presented, that notice has been duly given, and that a protest (where necessary) has been made. And such presumption may be made, though the promise was not made to the plaintiff, or in his presence, but to a subsequent indorsee who then held the bill or note. 13 East, 417.

26. The circumstance of a presentment by a public notary, does not warrant an inference that the bill had been duly presented. 1 M. & S. 28.

27. Application by the indorser, after declaration for further time to pay the bill, is

a waiver of an objection founded on a defective presentment, if given with notice; which may be presumed from the offer. 15 East, 275.

28. An acceptance may be by parol. Str. 1000. B. R. H. 74.

29. An acceptance may be partial. Str. 214.

30. Whether given facts amount to an acceptance, and whether it be absolute, or qualified only, is purely a question of law. 1 T. R. 186.

31. A promise to accept an existing bill, if it influence any person to take the bill, is a complete acceptance as to that person and all subsequent parties. 4 East, 57.

32. If the drawee of a bill, upon being applied to for acceptance, use words which import a promise to pay the bill, this amounts to an acceptance. *Aliter*, where the words are used upon a different occasion, and with a different intent, as where the occasion is an application not for acceptance, but for payment of the bill, and the intent be not to accept, but to pay. 4 M. & S. 305.

33. A promise in a letter that the writer will "accept, or certainly pay," a bill then drawn, is an acceptance. 5 East, 514. 2 Smith, 98.

34. A mere engagement to the drawer is none to the holder, unless accompanied by such circumstances as may induce a third person to take the bill. Cowp. 572.

35. If A writes a letter; "I will pay the bill if B. do not; I do not expect they will pay it, but judge proper to take their answer before I do;" you may "rest satisfied of the payment;" it is an acceptance; and interest shall be allowed from that time. Str. 648.

36. If A. desires leave to draw on B., and he will reimburse him by drafts on C.; B. consents; A. draws; B. accepts, and then writes to C., to know if he will accept their bills on the credit of A., and C. answers that he will honour their bill; this is an acceptance, and C. shall pay a bill drawn on him by B., after notice from him that A. has failed. 3 Burr. 1663.

37. A promise to accept a bill to be afterwards drawn, is no acceptance of the bill when drawn, unless some person be thereby induced to take or retain the bill; and indeed, it may be doubted, whether in any case, a promise to accept a non-existing bill, would now be considered as an acceptance of the bill when drawn. 1 East, 98.

38. A promise by the drawee of a bill, after a refusal to accept, and protest for non-acceptance, to pay on an application for payment, is binding, not as an acceptance, but as a promise to pay. 4 M. & S. 305.

39. If A., on being requested to accept a bill and draw upon B. for the amount, draws upon B., this by itself is not an acceptance, since the act sanctions no other inference than that he meant to ascertain whether he should be indemnified. 1 T. R. 269.

40. A foreign bill payable so many days after sight is presented for acceptance, dishonoured, and protested for non-acceptance. When it becomes due it is presented for payment, and a further demand made upon the drawee for the charges of protesting it. The drawee informs the clerk who brings the bill, that it would be paid, but that a certain portion of the charges would not. The clerk answers, that he cannot, without further orders, receive payment without the entire charges. He afterwards returns, having communicated with the holder; the drawee then refuses payment altogether. Held, that the offer to pay did not amount to an acceptance. The offer was not to accept the bill, and the parties never contemplated an acceptance. To make it enure as an acceptance, would be doing violence to the plain intention of the parties. 4 M. & S. 305.

41. If drawee refuses acceptances not having effects of drawer, and some time after he has effects, says he will do what he can, and the bill is again presented, and left with him for ten days, and drawee then offers to let the holder of the bill have some effects to sell and pay himself, this is not an acceptance. B. R. H. 278.

42. There may be a conditional acceptance. Cowp. 574. Str. 1152. 2 Wils. 9.

43. The holder of a bill is not bound to receive a conditional acceptance. And if he once refuses it, as by protesting the bill for non-acceptance, he cannot afterwards set it up. 1 T. R. 182.

44. An agreement to accept on certain conditions is discharged, if the conditions are not complied with. Dougl. 297.

45. A. in June, 1811, agrees to purchase a house of B. for 1000*l.* paying 500*l.* down; full possession to be given by 1st June, 1812. B. is arrested in June, 1811, on which A. accepts a bill for B. in favour of B.'s creditors, "payable, if the house should be given up, on 1st June, 1812." At B.'s request, A. puts his nephew into the house to take care of it, while B. remains in custody. B. having a bad title to the house, gives up all claim to it, and A. purchases it of the real owner, being allowed the 500*l.* which he had paid to B. Held, that the possession which A. had of the house from B. was not such

(F 7.) How paid.

The acceptor ought to pay the bill, by him accepted within three days after the time limited for payment. Mar. 23, 24. 1 Sal. 128.

And the three days shall be computed, exclusive of the day upon which it became payable. Mar. 23, 24.

Except where prejudice may happen by the delay: as, where the post will depart in the interim, or the third day is a Saturday, &c. Ibid.

So, if a bill be dated 1st May payable at usance, it shall be paid three days after the 1st June. Mar. 18.

If payable at double, or treble usance, three days after the 1st July, or August. Ibid.

If dated ult. February, three days after ult. April or May, and not after the 28th of April or May, though February has but twenty-eight days. Ibid.

If payable at a day certain, viz. 9th March, &c. it ought to be paid, according to the style where payable. Mar. 22. 25.

If payable at six days sight, it ought to be paid so many days after actual acceptance, or in three days after. Mar. 19.

[By the custom of merchants in London, the payer of a bill has the whole day, on which it becomes due, till five o'clock, to discharge it in. 2 T. R. 59.]

[*Quere.* Whether the acceptor of an inland bill is bound to pay it on demand at any reasonable time of the third day of grace, or whether he is allowed the whole of that day to pay it in? 4 T. R. 170.]

If a bill directs the payment at a certain place, it ought to be paid there, without other demand than at the place, though the acceptor lives at a place remote. Mar. 26.

such a compliance with the condition of the acceptance, as to support an action by the holder of the bill against A. 1 Mar. 176.

46. The drawee by accepting, admits the hand-writing of the drawer, and is, therefore, liable to a *bonâ fide* holder, though the bill is a forgery. 1 T. R. 654. 5 Burr. 1354. 1 Blk. 590.

47. An acceptance imports that the acceptor has received value from the drawer. 1 T. R. 409. 5 T. R. 182.

48. It has been held, that if the drawee write an acceptance on a bill left with him by the holder, he cannot revoke such acceptance, even while the bill remains in his possession, and before it is called for by the holder. 4 Esp. 270. Though this appears not to be settled. 6 East, 199. If, however, upon such acceptance being, in fact, cancelled by the drawee, the holder has the bill noted for non-acceptance, he will be precluded from afterwards insisting upon the validity of the acceptance. 6 East, *supra*. S. C. 2 Smith, 337.

49. If the drawee of a bill says he cannot accept it till stores are paid for, it amounts to an undertaking to accept when they are paid for. Cowp. 571.

50. A., in London, consigns goods to B. at Bristol, to be disposed of for him by B.; and, after they are shipped off, writes to B., inclosing the bill of lading, and requesting leave to draw on B. in about three months; to which B. replies, "that the moment the goods arrive, A. might depend on hearing from him, when he might draw upon him; or, that B. would send him a banker's draft." The goods arrive, and a bill at two months sight is presented to B., which he, being a creditor of A., refuses to accept. Held, that the promise by B., to give notice to A., when A. might draw upon him, was an undertaking to accept the bill when drawn; and that the three months were to be reckoned from the date of the letter, and not from the arrival of the goods. 2 Mars.

41. 6 Taunt. 340.

If it directs the payment to A. or order to the use of B., it shall be paid to A. or order, who is a trustee for B. R. 2 Vent. 310.

If a bill after acceptance be lost, upon notice of the loss by a notary, the acceptor ought to pay it, if a bond or sufficient security be given to him for his indemnity. Mar. 19, 20.

But if the deliverer after acceptance countermand his bill, and this be duly notified by a notary to the acceptor before the time of payment, it ought not to be paid: for the deliverer of the money is master of the bill till payment. Mar. 17, 18.

And, therefore, it ought not to be paid before it is due, and if it be, it will be at his own peril, if it be afterwards countermanded. Mar. 31. 32.

### (F 8.) How protested. For non-acceptance.

If the person, to whom a bill of exchange is directed, refuses acceptance, a protest of non-acceptance shall be made by a public notary, and thereupon the drawer, or indorser must give security for payment with damages and costs, if it be not paid by him, to whom directed, at the time limited in the bill. Mar. 24. 27. 28. (r)

[In an action against the drawer of a foreign bill a protest for non-acceptance must be proved. 5 T. R. 239. 2 T. R. 713.] (s)

So, it shall be protested, if it be accepted only for part. Mar. 17. 21.

If it be accepted at a day after the time of payment limited by the bill. Mar. 21.

If a bill, directed to two jointly, be accepted only by one. Mar. 16.

If it be accepted by a stranger, for the credit of the drawer. Mar. 21.

Or, by him to whom directed, for the credit of the drawer, but not for the intent mentioned in the bill. Mar. 30.

So, there shall be a protest, if he, to whom it is directed, cannot be found, or is not found at his house. Mar. 33.

So, if a bill be accepted, and afterwards the acceptor fails in his credit, other security may be demanded from the acceptor by a notary, and if it be refused, the bill shall be protested for want of better security. Mar. 27.

Security, upon a protest for non-acceptance, is usually given by another subscription under the protest, that he will be bound as principal for the sum mentioned in the bill, upon which the protest is made. Mar. 28.

But by the st. 3 & 4 Ann. 9. a protest need not be on an inland bill, unless it be for value received, and for 20%. or more.

And the drawer is not liable for costs, &c. on non-acceptance, unless protest be made for that cause, and notice given of it in fourteen days after, to him from whom the bill was received.

So, if he, to whom payable, does not protest the bill for several years after it is due, the drawer shall not be charged. Per Treby. 1 Sal. 127.

But an action lies upon an inland bill, since the 3 & 4 Ann. 9. for the original debt upon a bill, without a protest; for that is not re-

(r) To authorize a protest to a foreign bill, the demand must be made by a public notary. 4 T. R. 375.

(s) If the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reasonable grounds to expect that the bill would be honoured, a protest is unnecessary to charge him. 11 East, 171.

quisite, except for extraordinary damages for delay of payment. R. Mod. Ca. 81.

(F 9.) For non-payment.

So, if a bill be accepted, and not paid in three days after the time limited for payment, a protest shall be made by a notary for non-payment, and thereupon the drawer shall be bound to all damages and costs. Skin. 410.

And the drawer shall pay presently, or shall take the same time for it, as was allowed for payment upon the bill of exchange. Mar. 28.

And though the bill be protested for non-payment, or for want of other security, the acceptor shall not be excused. Mar. 13.

If a bill be protested for non-payment, security may be required of the drawer, as well as upon a protest for non-acceptance. Mar. 28.

Or, if the bill was before protested for non-acceptance and security then given, it is sufficient that notice be given to the drawer. Ibid.

So, if a bill be paid only in part, he may receive so much, and make a protest for non-payment of the residue. Mar. 17.

Though it was accepted only for part, and protested for non-acceptance. Mar. 16, 17.

Or, if a bill be accepted at a subsequent day, and a protest for non-acceptance, according to the tenor of the bill, if the acceptor afterwards refuse payment at the day by him accepted, it shall be protested again for non-payment. Mar. 21. 2 T. R. 713.

If the acceptor dies, the bill shall be demanded at the time it is due, of his executor or administrator, and if it is not paid, there shall be a protest. Mar. 32.

So, if he, to whom payable, die, and security be offered for the indemnity of the acceptor, there shall be a protest, if it be not paid, though no will be proved, or administration taken. Ibid.

(F 10.) How the protest shall be made.

The protest must be made by a public notary (t) upon all foreign bills of exchange. 1 Sal. 131.

[Because he is a public officer to whom credit is given. 4 T. R. 175.]

And upon the bill itself, not upon a copy, except for special cause. Sho. 164.

But where the first bill is lost, and a copy is sent; by reason a third cannot be had, and the second was not sent, the protest may be upon the copy. R. Sho. 164.

By the st. 9 & 10 W. 3. 17. the protest on an inland bill shall be by a public notary, or in default by other substantial person of the city, or place, before two witnesses, by writing under a copy of the bill: Know, &c. I A. on — day of — at the usual abode of — demanded payment of the above bill, which he did not pay, wherefore, I A. protest the said bill. Dated — day of —

The protest must be made during the usual time of commerce, viz. before sun-set. Mar. 27.

It ought to be made, regularly, at some time, upon the third day after the day of payment. Mar. 24.

(t) As to the qualifications and appointment of public notaries, vide 41 G. 3. c. 79.

Or, it may be at any day afterwards. Mar. 24.

By the st. 9 & 10 W. 3. 17. it shall be after the expiration of the three days after an inland bill becomes due.

And the protest shall be sent, or notice of it given, in fourteen days to the party from whom the bill was received, who shall pay on producing it, the principal, interest, and charges; otherwise he that neglects to make and send such protest, or give notice, shall be liable to all costs, damages and interest.

And therefore, for default of a protest of an inland bill proved at the trial, the drawer shall discount the damages, which he sustained by such default. 1 Sal. 131.

Or, he may have an action for such damages. 1 Sal. 131.

And the plaintiff shall lose his interest and costs for want of a protest in due time. Ibid.

[If the bill is not protested according to the 9 & 10 W. 3. the drawer cannot be charged for interest, nor can interest be allowed for money lent without a note. Str. 910.] (u)

### (F 11.) How a bill of exchange may be assigned.

If a bill of exchange be made payable to B. or order, B. by indorsement may assign it to another. 1 Sal. 125.

So, the assignee, or indorsee, may assign to another *toties quoties*. 1 Sal. 125.

So, an inland bill, payable to B. or bearer, may be assigned by B., and he will be liable to his indorsee. R. 1 Sal. 125.

If a bill be payable to B. or order, for the use of C., it may be assigned by B., though he be trustee for C. R. Carth. 5.

The indorser charges himself as the original drawer, and not only as surety for him. Cont. 1 Sal. 126. Acc. 1 Sal. 133.

And therefore in an action against the indorser, there is no need of proof of resort to the drawer, and refusal by him. Cont. per Holt, 1 Sal. 126, 127. Semb. acc. 1 Sal. 133. Vide *post*. (F 13.)

If upon a bill payable to B. or order, B. indorses his name and sends it to another to get it accepted, the other may indorse a receipt for the money, and receive it in his name, or indorse an assignment to himself. Mar. 30. 1 Sal. 126. 128. 130.

But a bill payable to A. or order, cannot be assigned to another for part of the money; for then upon a single contract, a man would be subject to several suits. R. Carth. 466. (x)

(F 12.)

(u) Which stat. gives a protest upon inland bills, payable at a certain number of days after date only. Therefore the acceptor of an inland bill, payable after sight, is not liable to the charge of a protest for non-payment. 4 T. R. 570.

(x) 1. A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor, so that if it be dishonoured in the hands of an indorsee, the indorser who takes it up may negotiate it again, provided no prejudice can thereby accrue to any party to the bill, who is discharged by his having paid it. Nor is a fresh stamp necessary on such refusing of the bill, since it remains operative as a bill until its end, payment by the acceptor, has been attained. 3 M. & S. 95. 1 H. B. 89. n.

2. An executor or administrator may indorse notes or bills. Str. 1260. Barnes, 164.

3. A bill payable to order is transferable only by indorsement. 5 Taunt. 786.

4. If a bill or note be post-dated when it may be, an indorsement by the payee, made  
even

even before the date, will entitle the indorsee to sue the drawer or maker, although the indorser die before the date of the bill or note. 13 East, 517.

5. A condition annexed by the payee to his indorsement, before acceptance, binds the acceptor. 4 Taunt. 30.

6. On a bill or note payable to several persons not in partnership, the right to transfer it is in all collectively, not in any individually. Dougl. 2d edit. 653. n.

7. A blank indorsement, so long as it continues blank, makes a bill or note payable to the bearer. 3 Burr. 1516. 1 Blk. 485. Dougl. 611.

8. *Semble*, that the title of an indorsee has no relation antecedent to the day on which the bill is transferred to him; at least he cannot set off the bill to an action commenced before the transfer. 3 T. R. 508. n.

9. Though a bill be indorsed over before the time appointed for its payment, yet if it has been dishonoured by the drawee's having refused acceptance, the indorsee will be liable to the same objections as might have been taken against his indorser, if he take the bill with a knowledge of its having been dishonoured. 13 East, 498.

10. Though a bill due upon the face of it is still negotiable, yet the party taking it acquires no better title than the person from whom he received it. 5 T. R. 80. 7 T. R. 630.

11. The holder of a banker's check may recover thereon, though he did not take it till long after date, and though the party of whom he took it could not have recovered upon it, provided he took it *bonâ fide*, and for a valuable consideration, and that it was not issued until some time after its date. 7 T. R. 425.

12. A *bonâ fide* indorsee for valuable consideration may recover against the acceptor of a bill for the accommodation of this drawer, though he took the bill with notice after it had become due, unless there was an agreement to the contrary. 1 Taunt. 224. See 5 Esp. 46.

13. If the consideration upon which a bill or note was made is not illegal, an illegality in the consideration upon which it is afterwards transferred will be no defence, if the plaintiff took it *bonâ fide* and upon a good consideration. 1 East, 92.

14. If a bill or note be deposited with a banker, for a particular purpose, indorsed so as to give him the right to transfer it, and he negotiate or pledge it; such negotiation or pledging, although it may amount to a gross breach of trust, and defeat the purpose for which the deposit was made, will be binding on the person who made the deposit; as between him and an innocent holder. 1 B. & P. 539. 1 B. & P. 648.

15. Where the proprietor of a bill indorses it, and gives it to another to raise money thereon, who passes it to a third without value, by whom it is in like manner passed to a fourth after it is due, the proprietor may recover it from the latter. 2 N. R. 170.

16. The property in bank notes, obtained *mala fide*, passes by delivery for valuable consideration and without notice. 15 East, 130. Id. 135. n.

17. In case of a loss by theft or accident, if the bill or note be assignable by mere delivery, the theft or finder may confer a title by transferring it. 3 Burr. 1516. Dougl. 633.

18. If a bill of exchange be lost after it is due, the loser may sue the acceptor thereon. This was virtually determined by the Court (one judge), referring it to the Master in an action on such a bill to see what was due thereon; a copy of the bill was produced, verified by an affidavit of the plaintiff's attorney. 5 M. & S. 281.

19. The *bonâ fide* indorsee of a bill cannot recover against the acceptor, if the name of the indorser, through whom he is obliged to make title, is forged. 4 T. R. 28.

20. If the holder of a bill get it discounted without indorsing it, or otherwise guaranteeing payment, he cannot, on the bill turning out to be a bad one, be compelled to refund the money, unless he knew at the time that it was so. 5 T. R. 757.

21. Indorsement by the drawer does not give him a new character, as indorser, or divest him of any liability, to which, as maker of the bill, he would have been subject. 3 Price, 253.

22. Where the indorsee of a note indorses to a prior indorser, he cannot be sued thereon by the indorser, unless his own name was originally used for form only, which fact must be disclosed by the declaration, since it will not be presumed even after verdict. 4 T. R. 470.

23. Bills are drawn on 12th May by a house in London on a house in Lisbon, payable 30 days after sight, and indorsed to A. in London: A. indorses them, without any qualification, to B. at Paris. Held, that A. was bound, by his unqualified indorsement, and could not offer evidence to show that he was acting merely as B.'s agent. 2 Mars. 454. 7 Taunt. 159.

24. An indorsement in these words, "the within must be credited to J. S." is restrictive. Dougl. 615. 657.

25. The



## (F 12.) Remedy upon a bill of exchange. Against the drawer.

If A. draws a bill of exchange upon B. payable to C., and it be protested for non-acceptance, not finding other security, or for non-payment by B.; an action upon the case upon *assumpsit* lies against A., by the custom of merchants for the money, and the damages consequent upon non-payment.

So, a general *indebitatus assumpsit* lies against the drawer, for money received to his use. 1 Sal. 125.

So, debt lies against A., who was indebted by receipt of the money. 1 Sal. 23. R. cont. T. 11 Geo. in B. R. *inter* Welsh and Craig, 1 Str. 680.

And A. shall be charged, though he be not a merchant; for when he makes a bill of exchange, he shall be liable according to the usage among merchants. R. 2 Vent. 295. 310. R. 1 Sal. 125. Sho. 125. Carth. 82.

So, A. shall be charged upon an inland, as well as upon a foreign bill of exchange. 1 Sal. 125. Clift. 927.

So, he shall be charged by C., though he has indorsed it to D., for his account, and as servant to him. R. Sho. 164.

So, if a bill be payable to C. or order, or to C. and his assigns, and by indorsement C. assigns to D., and he to others, and B. does not accept, &c. an *assumpsit* lies against A. by an indorsee or assignee. R. 2 Vent. 308.

So, if B. accepts, and afterwards fails in payment.

So, if an indorser pays to any indorsee, A. is afterwards liable to him. R. Lutt. 888. Carth. 130.

So, A. will be liable, though the bill was not presented at the due time, if no accident in the interim. R. Sho. 318.

So, A. will be liable, though the indorser was a trustee for C., against whom an extent was sued. R. Carth. 5.

But if the drawer upon protest repay the money to the deliverer, he shall not be afterwards liable to C., or any indorsee. Mar. 35.

So, the drawer shall not be charged, if the bill be not, after the time of payment, protested in a convenient time. Per Treby, 1 Sal. 127.

If a bill be not payable to another, or order, though it be indorsed, the indorsee shall not charge the drawer. Per Holt, 1 Sal. 133. (y)

(F 13.)

25. The mere omission of words to give a power of transfer, will not make an indorsement restrictive. 2 Burr. 1216. 1 Blk. 295.

(y) *Notice of dishonour; et vide supra*, Protest. — 1. If the holder of a bill does not give collateral parties due notice of its dishonour, he makes it his own. 1 T. R. 167. 2 T. R. 186. 2 Blk. 747. 5 Burr. 2670. Str. 829.

2. If the drawer had effects in the hands of the drawee when the bill was drawn, he is intitled to notice of non-acceptance, although, at the time when the bill was presented for acceptance, and thence until presentment of payment, he had not any. 7 East, 359. 3 Smith, 328.

3. If the drawer of a bill of exchange has reasonable ground to expect that it will be honoured on the strength of a consignment, he is entitled to notice of its dishonour, although no effects ever reach the drawee. 16 East, 43.

4. Where a bill was drawn for the accommodation of a remote indorsee, and the names of all the prior parties, were lent to him; held in an action against one of those parties,

parties, an indorser, that that defendant was entitled to notice of dishonour. 15 East, 216. S. C. Bailey on Bills, 137. 3d. edit.

5. The indorsee, without consideration of a bill drawn by a fictitious drawer, and accepted by a fictitious acceptor, is entitled to notice of the dishonour of the bill. 4 Taunt. 731.

6. If a bill of exchange is drawn and given in satisfaction of another bill dishonoured by one for whom, though no party to the original bill, it has been discounted, which also is dishonoured, and no notice of the dishonour given to the drawer, the original bill must be considered as satisfied, if it can be shown that the drawer had effects in the hands of the drawee. 3 M. & S. 362.

7. The acceptor of a bill is discharged by the want of due notice of the dishonour of another bill given by him in payment of the former, and on which he has a right to sue. 3 Taunt. 150.

8. If a foreign bill, presented for acceptance, be dishonoured, a protest for non-acceptance and notice are requisite. A subsequent protest for non-payment, with notice, will not supply the previous omission. 2 T. R. 713.

9. The payee and indorser of a note payable on demand, was held discharged under the following circumstances:—He had lent his name to enable the maker to obtain credit with the plaintiff, he having then lately stopped payment, which was known to all parties. The plaintiff made advances for six months upon the note, which advances they afterwards renewed, without any communication with the defendant. The maker became bankrupt, payment was demanded and refused, but no notice was given to the defendant. 15 East, 187.

10. It is no excuse for not giving notice to the drawer, that on an apprehension that the bill would be dishonoured, he lodged other money, which he had of the drawee's, in the hands of the indorser, on an undertaking by the indorser, that he would return it whenever it should appear that he was exonerated from the bill. 3 B. & P. 259.

11. It seems that no other circumstances but the having effects in the drawee's hands, can entitle the drawer to notice of dishonour. 2 T. R. 713.

12. If from the time when a bill is drawn to the time it is dishonoured, the drawer has no effects in the drawee's hands, he is not entitled to notice of its dishonour, so that the bill will not be payment; the use of notice being, that the drawer may withdraw his effects. 1 T. R. 405.

13. If the drawer had no effects in the hands of the drawee, it does not entitle him to notice that the payee had. 1 B. & P. 652.

14. Though the drawer of a bill of exchange having effects in the drawee's hands when he drew the bill, or having then reasonable grounds for believing that it would be honoured when due, has a right to notice of its dishonour, and is discharged by the want of it; yet his having sent goods to the drawee, for which payment is to be made on a day subsequent to that on which the bill becomes due, does not range within either of the cases proposed. It is not equivalent to effects in hand, since the money is not due; and it affords no ground for supposing that the bill will be paid; on the contrary, it shows that the drawee by postponing the day of payment has not cash in hand, or cannot conveniently part with it. 4 M. & S. 226.

15. Though ignorance of the place of residence of a party entitled to notice is an excuse for not giving any, yet it must appear to the satisfaction of a jury (to the court according to *Wightw. 76.*), that due diligence has been used to discover it. 12 East, 433.

16. Where the drawer said, before the bill became due, that it would not be paid; held unnecessary to give him notice of subsequent dishonour. 13 East, 213.

17. It was held in this case, that if the payee of a note lends his name merely to give it credit, and to enable the maker to raise money upon it, and knows at the time, that the maker is insolvent, he is not entitled to notice, and that it is no defence for him that the note was properly presented for payment. 2 H. B. 336. But see 13 East, 187.

18. As well in the case of a foreign as of an inland bill, the want of effects in the hands of the drawee excuses (protest and) notice. 2 T. R. 713.

19. The holders adding to a notice of dishonour duly sent, that having reason to believe that a friend of the acceptor would take it up in a few days, he would, to save expence, hold the bill till the latter end of the week, does not oblige him to give a second notice of non-payment. 16 East, 105.

20. The payee of a bill of exchange, having presented it for acceptance, which was refused, indorses it to the plaintiff for value, either to the drawer or to the indorsee. The latter presents it, and it is again refused acceptance, of which the drawer receives due notice. Held, that the drawer was not discharged from his liability to the indorsee.

indorsee by the payee's neglect to give notice of the previous dishonour. 1 Mars. 615. 6 Taunt. 305.

21. The notice must come from the holder himself; its object being to inform the other that he looks to him for payment. 1 T.R. 167. 2 T.R. 168. *Sub fine.* 2 Taunt. 224.

22. The notice must be sent within a reasonable time; and what is a reasonable time is, after the situation of the parties, and the other facts of the case have been ascertained by the jury, purely a question of law, since, for the sake of certainty, no question should ever be left to a jury which the court are (constitutionally and in the nature of things) competent to decide. 1 T.R. 167. 2 T.R. 186. *Sub fine.* 6 East, 3. 2 Smith, 195. See Dougl. 515.

23. The rule on the subject of notice is, that if the parties live in the same place, the notice must be later than the day after the dishonour. If at a distance, it must be sent by the next post. 1 T.R. 167. 2 T.R. 186. *Sub fine*, which means the next convenient post. 6 East, 3. 2 Smith, 195.

24. If notice is actually received at any hour before the expiration of that day on which it ought to be given, it is sufficient. 2 Taunt. 224.

25. Where a bill is returned for non-payment to a party residing in the country, and the post goes out so soon that day as to render it impossible or very inconvenient to give notice to the drawer by the next post on the same day, it may be an excuse for not sending notice to him by that post; but it must, at any rate, be sent by the next following post; and it will not be good if sent by a private hand on the next day, and it does not arrive till after the post. 2 Smith, 195. 6 East, 3.

26. Sending notice by post is sufficient, though it is not received; and where there is no post, it is sufficient to send by the ordinary mode of conveyance. 2 H.B. 509.

27. Where it is necessary or more convenient for the indorsee to send notice, by other conveyance than the post, of dishonour, he is entitled so to do, and may charge for the same. 2 Smith, 404.

28. In the case of a foreign bill, it is sufficient to send notice by the first regular ship bound for the place to which it is sent; and it is no objection, that if sent by a ship bound elsewhere, it would by accident have arrived sooner, though the holder wrote other letters by that ship to the place to which the notice was to be sent. 2 H.B. 565.

29. If the holder of a bill or note place it in the hands of his banker, the banker is only bound to give notice of its dishonour to his customer in like manner as if he were himself the holder, and his customer were the party next entitled to notice. And the customer at the like time to communicate such notice as if he had received it from a holder. 3 B. & P. 599. 9 East, 347. 15 East, 291.

30. If the day on which notice ought to be given should be a day of public rest, the notice need not be given until the following day. 3 B. & P. 599.

31. Notice of the dishonour of a foreign bill sent to a party residing here, is sufficient notice, though the fact of its having been protested is not likewise communicated. 1 M. & S. 288.

32. The circumstance that the defendant, the drawer of a bill dishonoured, on being applied to by the holder, advised him to return it to the plaintiff, the indorser, and that the drawer had paid the plaintiff money on account of the bill, are sufficient, whence due notice of dishonour may be presumed. 1 Taunt. 12.

33. An omission to give due notice of the dishonour of a bill to a party entitled does not extinguish the debt due from him upon the bill to the holder. Therefore he may revive the holder's right, by waiving the want of notice. 1 T.R. 405.

34. A party discharged by want of notice, may revive his liability by a subsequent promise to pay the bill, as by saying, when applied to, that it must be paid. 2 T.R. 713.

35. Notice of the dishonour of a bill is dispensed with, if, on calling at the party's counting-house within the hours of business, and knocking a sufficient time, no one is found in attendance. 1 M. & S. 545.

36. *Seemle*, a defence of payment by the drawer is a waiver of laches in the holder. Wightw. 76.

37. If the indorser of a bill, discharged by the laches of the holder, but of which circumstance he is ignorant, propose terms for liquidating the bill, which are rejected, he may, nevertheless, stand upon his original rights. 1 T.R. 712.

38. An indorser by an indorsee discharged by delay, applied to for payment by a letter explaining the laches, "that he could not think of remitting till the bill was sent, and that if he was considered unsafe, it might be returned to another indorser," was held to be no waiver. 4 Taunt. 93.

(F 13.) Against the acceptor, &c.

So, if A. draws a bill of exchange upon B., payable to C. or order, and B. accept it, an *assumpsit* lies by the custom of merchants by C. against B., for by his acceptance he undertakes to pay. R. 1 Rol. 6. l. 45. 2 Cro. 306.

So, if C. by indorsement assigns to D., and he to others, B. will be liable to an *assumpsit*, by any assignee.

So, every indorser shall be liable to any subsequent indorsee. R. Skin. 343. 410.

Though the bill was payable to B. or bearer; for the indorsement makes a new bill. -R. 1 Sal. 125. 133. Skin. 410.

Though the bill was forged, &c. for the indorsement charges the indorser, and therefore the hand of the drawer to the bill need not be proved. Per Holt, 1 Sal. 127.

If A. draws two or three bills for the same sum, according to the custom of merchants, the one payable if the other be not paid, and B. accepts the second, and not the first, an *assumpsit* lies against him upon the first with an averment, that he has not paid the one or the other. Dub. T. 12. W. 3. inter Milner and Harrison.

If B. accepts a bill for himself and C., who are joint-traders, in respect of their trade, both are bound. 1 Sal. 126.

If the acceptance be a year after the bill was payable. R. Carth. 459.

So, if A. draws a bill payable to C., for the use of D., and C. indorses it, an *assumpsit* lies by the indorsee, though C. had paid it upon an extent at the suit of the king against D. For C. was the visible owner. R. Sho. 4.

Though C. sold to the indorsee upon a discount, where the bill is payable to C. or order, and not bearer. Per Holt, 1 Sal. 128.

Though a recovery be against the drawer, if no satisfaction thereon. R. cont. but reversed, 2 Sho. 495.

But debt does not lie against the acceptor; for his engagement is collateral. R. Hard. 487. Acc. 1 Sal. 23.

So, if the drawer upon a protest repay the money mentioned in the bill to the deliverer, the acceptor cannot be afterwards sued by him to whom the bill was payable, if he was only assignee to the deliverer. Mar. 35.

So, if an indorser be not charged in a convenient time after the bill due, an action does not lie against him. Per Holt, 1 Sal. 128. 132.

And three days seem a convenient time upon an inland or foreign bill; but the usage of merchants ought to govern in such a case. 1 Sal. 132, 133.

Or, if there be not a demand, or a prior endeavour to have it from him, who drew the bill, or to whom it was directed. 1 Sal. 126, 127, 132. Vide ante, (F 11.) post, (F 14.)

If there be not a demand on the indorser after the indorsement made. Per Holt, 1 Sal. 128.

So, if a bill payable to B. or bearer, be indorsed to another, the indorsee cannot maintain an action upon it. R. 1 Sal. 125. Skin. 332.

If a bill be accepted by one joint-trader for himself and his partner,  
Vol. V. K when

when it does not concern their trade, it does not bind his partner.  
1 Sal. 126. (y)

(y) 1. Action lies for the drawer against the drawee after acceptance. 1 Wils. 185.  
2. When a bill is dishonoured, though before the day on which it is drawn payable, every one must immediately answer to the holder, who became party to it before him. Dougl. 55. 3 East, 481.

3. An action lies for the indorsee of a bill against a tenant on whom it is drawn and accepted generally, though the order is to place it to the amount of his masters, and the letter of advice sent to his masters. Str. 955. B. R. H. 1.

4. The drawer of a bill is only bound to pay within reasonable time after receiving notice of its being dishonoured. Therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time. 1 Mars. 36. 5 Taunt. 240. 778.

5. Giving time to any of the parties is a discharge of every other party who, upon paying the bill or note, would be entitled to sue the party to whom such discharge or time has been given. 2 B. & P. 61. 8 East, 576. Str. 792. Dougl. 250. 1 T. R. 167.

6. An agreement by the holder of a bill of exchange to give time to a party liable to him thereon, not only suspends his right for the time against that party; it destroys it altogether against those whose names are upon the bill, between himself and the person forborne; for this reason, that to sue them before the expiration of that time would be to violate his agreement, since they would immediately call upon the party forborne; and he cannot sue them afterwards, perhaps because either the rule that a personal right in action once superseded is gone for ever, or he has no right to postpone their remedies upon the bill. But parties to the bill, antecedent to the person forborne, are not thereby discharged, since the same reason does not hold to prevent the holder suing them *instantly*. 4 M. & S. 251.

7. Though discharging or giving time to any of the parties is a discharge of every other, who, upon paying the bill or note, would be entitled to sue the party to whom such discharge or time has been given; yet, if such other party assent to the time being given, he promise to pay the bill or note, his liability will be continued in the former case, and revived in the latter, though in the latter such promise were made under a misconception of the law, the party believing himself to be still liable. 3 B. & P. 565. 12 East, 58.

8. Agreeing, after a bill has become due and been regularly protested for non-payment, and notice thereof given not to press the acceptor, will not discharge the drawer. 1 B. & P. 652.

9. Where, on communicating to the drawer an offer that had been made by the acceptor, he answered, "You may do as you like; for I have had no notice of the non-payment," whereas, in fact, he had; held, that the declaration amounted to an assent. 5 B. & P. 565.

10. A bill is indorsed by A. to B., by B. to C., and C. to D. It is dishonoured in D.'s hands, who thereupon returns it to C., by whom time is given to the payee for discharging it. The bill is afterwards returned to D., who sues the drawer thereon. Held, that as there was not privity between D. and C., in the given time to the payee, C.'s act could not prejudice D.'s right. 4 M. & S. 226.

11. Though the payee receive part of the money from the drawer when the bill becomes due, and takes an undertaking from him indorsed on the bill, to pay the residue at a future time, the acceptor is not discharged. Dougl. 250.

12. Nothing will discharge the acceptor of a bill of exchange but payment or release; therefore, he is not discharged by the holder taking a *cognovit* from the drawer; and its being an accommodation-bill makes no difference; nor that the holder when he takes it knows it to be so. 1 Mars. 14. 5 Taunt. 192. 4 Taunt. 750.

13. Receiving part of the money on account from an indorser, will not discharge the drawer. 1 B. & P. 652.

14 The holder of a bill of exchange may sue a subsequent indorser, notwithstanding he has ineffectually taken in execution the body of a prior indorser, and afterwards set him at liberty. 2 Blk. 1285.

15. If the drawer of a bill of exchange is compelled to pay through default in the acceptor, a new cause of action against the acceptor thereby arises, which cannot be affected by what may have passed between him and the former holder. Therefore, he is liable to the drawer, notwithstanding his discharge under the lords' act on an execution at the suit of the former holder. 4 T. R. 525.

16. Nothing

(F 14. a.) How the remedy is to be pursued.

In an *assumpsit* upon a bill of exchange, the plaintiff must declare upon the custom of merchants; for an *indebitatus assumpsit* does not lie without a consideration proved. Per 2 J. 1 Vent. 153. Semb. Lut. 1585. 1594. Carth. 83. Skin. 332. R. 2 Mod. Ca. 373.

And if the declaration be upon the custom, and also an *indebitatus assumpsit*, and entire damages, there shall be no judgment. 1 Vent. 153. R. 1 Sal. 24. 129. 1 Lev. 298.

So, it must allege the custom amongst merchants, &c.; for if it be alleged amongst all persons, it will be bad. R. Lut. 892. b.

Or, that by the custom of England, though the words, "of England," shall be rejected as surplusage. R. Hard. 486. R. 5 Mod. 367.

So, the declaration must shew the custom pursued; and therefore it ought to shew the time and manner of acceptance. R. Lut. 233.

Ought to shew what the time shall be by the usage if the bill be payable at usance, &c. 1 Sal. 131.

But if the custom be alleged at London, that any merchants, &c. it is well. R. Lut. 233. 1585.

And if the plea be general, that by the custom of merchants, &c. it is sufficient, without showing the custom specially; for the court will take notice of it. R. Sho. 129.

If the declaration be upon the custom, and that he to whom directed refused payment, *per quod* the drawer *onerabilis devenit*, it is sufficient, without an express promise alleged. R. 1 Sal. 128.

16. Nothing but an express declaration by the holder will discharge the acceptor. Dougl. 476.

17. If there is a virtual acceptance, in consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy on them, the holder of the bill, by taking to the goods and selling them himself, discharged the acceptor. Dougl. 297.

18. A bill is accepted payable at a banker's counting-house. The bill when due is not presented for payment, whereupon the acceptor writes to the holder (the drawer) saying that the bill might be returned to him; who in answer, acquaints him that the bill could not be found. Afterwards, and after a lapse of time sufficient to have withdrawn the funds which the acceptor had placed with the banker to answer the bill, the banker fails with said funds in his hands. Held, that the acceptor was still liable on the bill (which, upon farther search, was discovered). For, upon notice that the bill was lost, he was under no further obligation to keep funds with the banker; his neglect, therefore, to withdraw them was at his own risk. 4 M. & S. 462.

19. To an action by the indorsees of a promissory-note against the drawer, the defendant pleaded that he drew the note as surety only for the payee, and that the plaintiff had released the payee from all claim in respect of the said note; without alleging the plaintiff had notice of the want of consideration between the defendant and payee. Held, that the release did not operate as an extinguishment of the consideration which the plaintiff had given to the payee for the note, so as to make it a note without consideration between himself and the defendant, and, therefore, that the plea was bad. 1 Mars. 207. 5 Taunt. 551.

20. A person who has been once discharged by laches from his liability on a bill or note is always discharged. Therefore, where two or more parties to a bill or note have been so discharged, but one of them not knowing of the laches, pays it, he pays it in his own wrong, and cannot recover the money from another of such parties. 12 East, 454.

21. A promise without new consideration, to pay a lost bill, is void. 4 Taunt. 602.

22. The acceptor cannot be sued here after he has been discharged by the laws of the country where the acceptance was made. Str. 733.

So, it is sufficient to say, *quod fecit billam manu suâ subscript.*, though it does not say, *secundum usum mercatorum.* R. Lut. 279.

Or, that value was received. Lut. 889. a.

That it was accepted and paid for the honour of the drawer, without saying to whom. R. after verdict. R. Lut. 899. b.

That the defendant was an indorser, without an averment, that the plaintiff demanded it of the drawer, or former indorser. Cont. per Holt. 1 Sal. 126. R. acc. 1 Sal. 133. Vide ante, (F 11. 13.)

That the defendant undertook to pay *secundum tenorem billæ*, though the acceptance was after the bill due; for *secundum tenorem* shall be rejected as surplusage. Per Holt, 1 Sal. 127. 129.

It is not necessary to make mention of the protest in a declaration upon an inland bill upon the st. 9 & 10 W. 3. 17. R. 1 Sal. 131.

Or, that he inquired for him, to whom the bill was directed, before protest; for *quod non fuit inventus*, is sufficient. R. Carth. 510.

Nor, is it necessary to allege a promise after protest. Ibid.

So, if the custom be alleged, that the bearer shall maintain an action upon a bill payable to B. or bearer, and the defendant demurs, judgment shall be for the plaintiff; for, by the demurrer, the custom is confessed, though there is none such. R. 1 Sal. 125. Skin. 346.

So, if the declaration alleges, *quod indorsavit*, without saying that he subscribed it, it is sufficient after verdict for the plaintiff; for a good indorsement must be proved. R. 1 Sal. 130.

So, if the action is upon the first bill, and it is not alleged that the second or third was not paid; for it shall be intended after verdict. R. 1 Sal. 130. Carth. 510.

[When a bill is drawn, Pay my first, my second not paid; in an action on the first, it is not necessary to aver that the second was not paid. The averment on one goes to the other also. Str. 214.]

[It is not necessary to lay an express *assumpsit*; nor to allege a request before action brought. Ibid.]

So, if the declaration alleges the custom to be, that if a bill be duly accepted and afterwards refused, the drawer shall be liable, and shews that the bill was, after the time it became due, presented and refused, it will be well; for the drawer is liable at any time; and the alleging the custom more strict than was necessary, was surplusage. R. Sho. 318.

So, in a plea of a bill of exchange, the custom need not be alleged. R. Carth. 83. (z)

(z) 1. *Declaration.* — An averment that on such a day a bill was drawn, payable such a time after date, sufficiently expresses that the bill was dated on that day. 3 B. & P. 173.

2. In declaring on a bill or note, it is not necessary to state that the drawer or maker delivered it to the payee; it is implied in the allegation that he made the bill. 7 T. R. 596.

3. An averment that a bill accepted payable at the house of certain persons, was presented for payment to those persons, "according to the tenor and effect of the acceptance," imports that it was presented at their house. 3 Taunt. 415.

4. If it be stated that the bill was delivered to the drawee, and that he accepted it, it is not necessary to allege that he delivered it back. 5 East, 476. 2 Smith, 43.

5. In declaring on a promissory-note, made payable at a particular place, if (after having averred a presentment at the place) it be alleged that the defendant has not paid the money, but has always refused so to do, it is sufficient, without stating in terms

terms that the defendant refused payment on presentment at the place, the greater refusal of payment every where, includes the lesser, of payment at the appointed place. 3 M. & S. 150.

6. If a protest, when necessary, be not stated in the declaration, it is a ground of nonsuit; but the defendant cannot therefore move in arrest of judgment. 2 T. R. 714. n.

7. Declaration that defendant and another made their promissory-note, by which they jointly or severally promised to pay, is unobjectionable. Cowp. 832.

8. In a declaration by the indorsee against the acceptor on a bill of exchange, it is not necessary to aver that the acceptor had notice of the indorsement. 2 Smith, 44.

9. Notice of indorsement need not be averred in an action by the indorsee against the maker of a note. 1 B. & P. 625.

10. The omission in an action against an indorser, of alleging a demand on the acceptor, and refusal by him, on the day the bill became due, and notice to defendant, is not cured by verdict. Dougl. 679.

11. Evidence. — If a party insists, as a part of his case, that a debt has been satisfied, the proof that it has been, and therefore of all circumstances essential to a complete satisfaction, lies upon him. If, therefore, a bill of exchange is given in satisfaction of another bill dishonoured, which second bill is also shewn to have been dishonoured, a party sued upon the original bill, must, if he contends that such bill has been satisfied in law, by the want of notice of the dishonour to the party giving it, shew that no notice was given. 3 M. & S. 362.

12. The drawer of a bill must be presumed to have effects in the hands of the drawee; so that it lies on the holder to prove the contrary to excuse the want of notice. 2 T. R. 713.

13. The holder of a bill lost by, or embezzled from, the defendant, must, if duly required before trial, prove on what consideration he took it. 4 Taunt. 114.

14. A protest must be proved in an action on a foreign bill. 5 T. R. 239.

15. To suffer judgment by default is to admit the demand; therefore the *quantum* of the demand, and not its existence, can alone be litigated under the writ of inquiry. 3 Wils. 155. 2 Blk. 748. Hence a defendant sued as acceptor of a bill, need not be proved to have accepted it; though the bill must be produced at the inquisition, to see whether any part has been paid. 3 T. R. 301.

16. If the drawee of a bill accept it, saying that though the drawer had not remitted to him, he expected that he would in a few days, and that as he had a bill of his for a larger amount, which would be paid, he would take all risks upon himself, this is not evidence of money had and received by the drawee to the use of an indorsee. Particularly if the action be upon the bill, and the defendant have no notice of the plaintiff's intention to charge him for money had and received. 3 B. & P. 559.

17. To warrant the inference, that B. an acceptor, knew that the payee was fictitious evidence of irregular and suspicious conduct in regard to their bills drawn by the same drawer, payable to fictitious payees, and accepted by B. though no connection is shewn between those bills and the present, nor knowledge by B. that in those the payees were fictitious, proved. 2 H. B. 288.

18. A., in Jamaica, draws a bill on B. in London, on a Jamaica stamp, leaving the payee's name in blank. C. gets possession of the bill, and inserts his own name as payee, without any other authority than a letter from B. promising to accept it; but having the address torn off, and containing nothing to shew to whom it was addressed; held, that this was not evidence to shew that C. was payee of the bill. 1 Mars. 29. 5 Taunt. 529.

19. Generally speaking, the indorsee of a bill of exchange payable to order, must, in deriving his title, prove the hand-writing of the first indorser; but *quære*, whether the case of a *bonâ fide* holder of a bill payable to a fictitious payee, is not an exception to it? 3 T. R. 174.

20. The drawee of a bill, by accepting it, only admits the handwriting of the drawer, not therefore that of the first indorser, where the bill has been indorsed before acceptance; so that the hand-writing of the first indorser must be proved on suing the acceptor. 1 T. R. 654.

21. Practice. — A bill must be produced to be enforced. 4 Taunt. 602.

22. After judgment by default in *assumpsit* on a bill of exchange, the Courts of K. F. & C. B. will refer to the Master to see what is due for principal and interest. 4 T. R. 275. 1 H. Bl. 252. Id. 529. 541. The Court of Exchequer will not. Anst. 249.

23. After judgment, by default in debt, on a judgment upon a bill of exchange, the Court, on behalf of the plaintiff, will not refer to the master to compute what damages he is entitled to. 8 T. R. 369.



## [ (F 14. b.) Alteration. ] (a)

24. A rule to refer a bill to the prothonotary, cannot be resisted on the ground of irregularity in the judgment. 1 B. & P. 569.

25. Where one of the counts in a declaration is on a bill of exchange, or a promissory-note, and there is a demurrer to that count, and judgment for the plaintiff, and issues are joined upon the other counts; the plaintiff may refer it to the officer to compute what is due for principal and interest on the bill or note on that count, before a *nolle prosequi* is entered as to the issues. 7 T. R. 473. But see 2 Smith, 44, and Tidd's practice, *contra*.

26. After judgment by default in an action on a bill or note, it will not be referred to ascertain the amount of charges and expences. 2 B. & P. 55.

27. A foreign bill will not be referred to the master to compute re-exchange. 12 East, 420.

28. The Court will not refer a bill of exchange for foreign money, such as Irish money, to the Master, since the value can only be ascertained by a jury. 5 T. R. 87.

29. If interlocutory judgment on a bill of exchange be signed in the K. B. for want of a plea, a rule may be granted on the same day for referring the bill to the Master. But if such judgment be given upon demurrer, the plaintiff must wait for his rule until the day following, since here the day upon which judgment is given, was granted by the record to the parties, and it would be incongruous to deprive either of them of a part of the day, after the whole of it had been already granted to them. 3 M. & S. 109. 3 Smith, 179.

30. The defendant is entitled to notice of the time of computing principal and interest on a bill. 4 Taunt. 487.

31. Proceedings will be stayed in an action against an indorser of a bill, upon payment of the debt and costs of that action; against the acceptor only, on payment of the costs of the different actions instituted by the plaintiff by reason of his default. 4 T. R. 691.

32. If, pending a suit on a negotiable instrument, the plaintiff deposits it as a security, the depositary (with notice) cannot sue thereon; and the plaintiff's right is not affected thereby. 1 Taunt. 109.

(a) 1. Any alteration which vitiates a deed will avoid a bill of exchange, inasmuch that it is not available, even in the hands of a *bona fide* holder for valuable consideration. 4 T. R. 320. 5 T. R. 567. 2 H. B. 140. 1 Anstr. 225.

2. If two persons exchange acceptances, and, before they pass them away, alter the dates, new stamps are necessary. 9 East, 190.

3. A material alteration in a bill of exchange, after acceptance, though before indorsement, vitiates it. 1 M. & S. 735.

4. A bill drawn payable so many days after sight, is accepted, and then, by mutual consent of drawer and acceptor, altered twice; the first time by increasing the days of payment; the second by restoring the bill to its original form, and bringing forward the date. Both alterations were made before the bill was transferred by the drawer, but the second was made after the bill had become due, as it originally stood. Held, that as when the last alteration was made, the bill, according to its original tenor, was spent, that alteration was the drawing of a new bill, and rendered a new stamp necessary. 5 T. R. 537.

5. A material alteration of a bill, as, by bringing forward its date, accepted and re-delivered to the drawer as a security for a debt, though before indorsement, vitiates it, unless made to correct a mistake. 15 East, 412.

6. A banker's check cannot be post-dated without a stamp. 3 B. & P. 559.

7. An alteration by the drawee on acceptance, after indorsement, postponing the time of payment, vitiates the bill, which cannot by re-stamping be made available, is a conditional acceptance against antecedent parties. 1 Taunt. 420.

8. An alteration in a bill of exchange accepted at a particular place, of the place of repayment, is a material alteration. 1 M. & S. 735.

9. Inserting words in a bill or note originally, stating such value to have been received on a particular account, will render a new stamp necessary. 10 East, 431.

10. Where an alteration is made in a bill or note with the consent of all parties, in order to correct a mistake, and to make the instrument consistent with the original intention of the parties, a fresh stamp is not necessary. 3 Esp. 246.; *cor.* Le Blanc. J. cited. 10 East, 435, and 15 East, 417.

11. A bill of exchange is not vitiated by a third person, through mistake cancelling the acceptance. 15 East, 17.

[ (F 14. c.) Apportionment. (b) ]

[ (F 14. d.) Re-exchange and extra Charges. (c) ]

(F 15.) Promissory-Note.

So, by the st. 3 & 4 Ann. 9. after 1 May, 1705, all notes made by any person, (or by the servant or agent of any trader, usually entrusted to sign notes for his master,) whereby promise is made to pay a sum to any or order, shall be payable, indorsible, or assignable, as an inland bill of exchange.

And the person to whom payable, indorsed, or assigned, may maintain an action against him who signed, or whose servant or agent signed it, or against any of the indorsers, as in case of inland bills of exchange.

And notes payable to any, or bearer, shall be construed due to the person to whom made payable, who may maintain an action as in case of inland bills against him who signed, or whose servant or agent signed it.

[Three days' grace are allowed on promissory-notes as well as on bills of exchange; for the st. 3 & 4 Ann. c. 9. puts them upon the same footing in every respect. 4 T. R. 148.]

12. If the drawee on acceptance vitiate the bill, by postponing the time of payment, and the holder on its being returned, makes no objection, but presents it at the deferred period, his assent to the alteration may be presumed. 1 Taunt. 420.

(b) 1. In those cases which a defendant might insist upon a total want of consideration, if there really was none, he may shew that the consideration does not extend to all the money payable by bill or note, and the plaintiff shall only recover for the residue. Peake, 61. But the money as to which the consideration fails, must be of a specific liquidated amount; for where the partial failure of consideration arises from unliquidated damages, sustained by the breach of a subsisting contract, the performance of which was the consideration of the bill or note; but the plaintiff will be entitled to a verdict, in like manner as if there had been no such failure of consideration, leaving the defendant to his cross-action. 1 Camp. 40. n. 2 Camp. 346. 14 East, 486. 3 Camp. 38. 7 East, 479, 480.

2. After a partial satisfaction, the holder is entitled to a verdict only for what remains unpaid. 1 H. B. 88. 2 Wils. 262., questioned by Wilson J. in the above.

3. If, when a note is indorsed, the indorser tells the indorsee that he must not negotiate it, as he should want it when he came to settle accounts with the maker, the indorsee's right against the maker is to the same extent, and no more, as the indorser's. 1 B. & P. 398.

(c) 1. The drawer of a foreign bill is liable for the re-exchange, and every other expence arising from the non-acceptance or non-payment, notwithstanding the dishonour is expressly ordered by the country on which it is drawn. 2 H. & B. 378.

2. Upon a foreign bill, the re-exchange forms a part of the expence of the return; and, let the bill be returned through ever so many hands, the drawer is liable for the re-exchange upon each return. 2 H. B. 378.

3. An acceptor is not liable for re-exchange. 12 East, 420.

4. Where, on a question whether the plaintiff was entitled to re-exchange, the jury, on full consideration, found for the defendant; and it was not clearly apparent that a course of re-exchange subsisted between the two countries. A new trial was refused, because the Court would infer that the verdict went upon the ground that it did not. 11 East, 265.

5. The costs of a declaration against the drawer are not chargeable on an indorser, who is sued, till the appearance-day of the return. 2 Blk. 749.

6. Where a bill is returned to an indorsee dishonoured, he may claim extra charges against the indorser, exceeding 5 per cent., if they are fair and reasonable, and warranted by usage. 2 T. R. 52.

[Three days' grace are allowed on notes payable to A., without adding "to his order, or to bearer." 6 T. R. 123.]

Before that statute, a note payable to A. or order, if it was assigned or indorsed to B., could not have been sued by B. except in the name of A.; for it was not in the nature of a bill of exchange. R. cont. in C. B., T. 9 W. 3. rot. 500. Cromwell. Dub. B. R. T. 12 W. 3. inter Swift and Butcher. R. acc. B. R. Clerk and Martin, 1 Sal. 129. R. inter Buller and Crips, 2 Ann. Mod. Ca. 29.

So, upon a note to A. or bearer, the law does not presume an *assumpsit* to the bearer. R. 2 Lev. 299. Acc. inter Butcher and Swift, T. 12 W. 3.

And the plaintiff could not declare upon a promissory note, as upon a bill of exchange. R. 1 Sal. 24. 129.

But now, upon a note to A. or bearer, an *assumpsit* lies by A.

And if a note be payable to A. or order, an *assumpsit* lies by A., or by any to whom it shall be indorsed; for by the st. 3 & 4 Ann 9. the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages. 2 Mod. Ca. 374.

Yet debt does not lie upon a promissory-note, by any against the indorser, or drawer; for it is made by the st. 3 & 4 Ann. 9. of the nature of a bill of exchange, which is only evidence of a debt. R. 2 Mod. Ca. 373.

[Whether demand on drawer is necessary to charge indorser, is a point in much doubt; but the objection must be made at trial; for on the face of the declaration it is well. B. R. H. 322.]

Eyre C. J. in C. B. directed to find for defendant, indorser of a promissory-note, because plaintiff did not prove demand on the drawer. Str. 649.]

[There must be a demand on the drawer of a note before the indorser can be charged; if he is run away, it is not enough to shew that, but plaintiff must prove he attempted to find him out. Str. 1087. Per Hardwicke C. J. Sed vide infra.]

Hardwicke C. J. said, Holt C. J. and Eyre C. J. were of opinion that the indorser of promissory-note should not be charged, unless a demand had been made on the drawer; but that Pratt C. J., King C. J., Raymond C. J., and himself, were of opinion he might, and determined accordingly in this case. B. R. H. 295. Sed vide supra, (F 14.)

[If indorser pays part of a note, it is not necessary to prove demand on drawer. Str. 1246.]

[If the indorsee receives part of the drawer, the indorser is absolutely discharged. Str. 745.]

[It is the same thing, whether the drawer, or one for him, pays the money; and so, if the drawer is sued by the indorsee, who obtains interlocutory judgment, and the bail pay the note, and take assignment of note and judgment, they cannot recover against the indorser. Wils. 46.]

[If husband indorses a note given to him by his wife, it is good as between him and the indorsee. 2 Atkyns, 181.]

[So, if the note be given by an infant. Ibid.]

[So, though some of the indorsees did not pay a valuable consideration, yet if the last did, it is good as to him, unless fraud or equity appears. Ibid.]

[The

[The bearer of a note, "pay to ship Fortune, or bearer," may bring action in his own name, and declare both as on an inland bill of exchange, and for money had and received. B. M. 1516.]

[If plaintiff has indorsed a note in blank, his name may be struck out after the note is delivered in at *nisi prius*. Str. 1103.]

[Proof of the acknowledgment of indorser of his name, is not evidence against the drawer in action by indorsee; the indorser's hand must be proved. Barnes, 436.]

[If a promissory note is wrote in the defendant's own hand, there needs no subscription, nor need it be laid in the declaration that he signed it. Str. 399. 2 Ld. Raym. 1376. Str. 609.]

[If one action is brought against the drawer, and another against the indorser of a promissory-note, execution shall be only on one. Str. 515.]

[Promissory-note payable to A. or order, may be assigned by the administrator of A., and the indorsee may bring action in his own name, without *proferit* of the letters of administration alleging custom of merchants. 3 Wils. 1.]

[By stat. 15 G. 3. c. 51. negotiable promissory-notes and inland bills under 20s. are prohibited under penalty from 20l. to 5l. recoverable before one justice on non-payment and want of distress, three months' imprisonment; to continue five years.]

[By stat. 17 G. 3. c. 30. negotiable notes under 5l. shall specify the person to whom payable; the real date; shall be payable within 21 days of it, and not negotiable after that time. Note and indorsement to be attested by one witness. Penalties as in 15 G. 3. c. 51; both acts to continue five years.]

(F 16.) What words make a promissory-note assignable.

A note promissory does not require any express form of words; and therefore a note, whereby A. promises to account with B. or order for 10l. is good and assignable; for it is tantamount to "I promise to pay," &c. R. 11 Geo. 2 Mod. Ca. 363.

[A promissory-note to pay within two months after a ship is paid off. Str. 24. H. 23 G. 2. 1 Wils. 262.]

[A promissory-note from A. to pay so much to B. for the debt of C. to B. Str. 264.]

[A promissory-note to be accountable to order for 100l. value received. Str. 629. 2 Ld. Raym. 1396.]

["I do acknowledge that A. delivered me such bonds and notes, and B.'s receipt and bill on me for 10l., which 10l. and 15l. 5s. balance due to A. I am still indebted, and promise to pay." Str. 706.]

["I promise to pay to A., &c. three months after date, value received of the premises in Rosemary-lane." Ld. Raym. 1545.

[Note given to an infant, payable when he shall come of age, viz. such a day. 1 B. M. 226.]

[To pay six weeks after the death of his father; for there is no contingency whereby it may never become payable. Str. 1217. Willes, 393. S. C.]

But, I promise to pay 70l. or surrender A., is not assignable; for it was satisfied by surrender. R. 11 Geo. 2 Mod. Ca. 362.

Or, I promise to pay 10l. to B. if my brother does not by such a day. 2 Mod. Ca. 263.

[Or,

[Or, to pay so many days after granter should marry, is not negotiable within the statute. Str. 1151.]

[Or, to deliver up horses and a wharf, and to pay money at a certain day, within the statute. Str. 1271.]

[A note payable eventually, upon an uncertain contingency, can never be a negotiable note; as to pay on the death of A. if he leaves drawer sufficient to pay it, or he is otherwise able. 1 B. M. 323. 5 T. R. 482.]

[The plaintiff declared on a promissory-note given to him by the defendant, and alleged that before the note was given it was agreed between them, that if the defendant should buy of the plaintiff all the malt expended in his dwelling for three years, the note should be void; averred that the defendant had expended a certain quantity of malt, and had not bought it of plaintiff; and it was holden good on demurrer, because the note formed no part of the agreement, and might have been declared upon singly, or at the most, that the agreement must be considered only as a defeazance, and then if the defendant would take advantage of it, he should shew the performance on his part. Willes, 145.]

[The executor or administrator of a payee of a promissory-note may assign it over, so as to enable the indorsee to sue in his own name. Willes, 559. Barnes, 164. S. C.]

[The indorsee need not, in his declaration, make a profert of the letters of administration granted to the indorser. Ibid.]

### (F 17.) When a Bill, &c. shall be Payment.

If a bill of exchange or promissory note be given to another, and accepted as money, it will be a good payment.

So, if A. sells goods to B. who agrees to deliver a bill, or note for his satisfaction, if the bill, &c. be delivered, it will be a payment, though the bill be never paid. 1 Sal. 124.

So, if A. gives his own bill of exchange upon B. payable to C. or order, to C. for value received, who keeps it for two years, it will be a payment; for if he does not resort to A. in a convenient time, it shall be presumed, that he is satisfied with the bill. Per Holt, Sho. 155.

By the st, 3 & 4 Ann. 9. an inland bill accepted for satisfaction of a debt shall be deemed full payment, if the person accepting it take not due course to obtain payment, by endeavouring to get it accepted and paid, or protested.

[If a man receives a goldsmith's note at two on Saturday, and does not demand it till Tuesday morning, it is payment. Str. 508.]

If A. indorses a promissory-note to B. who gives a receipt, "received the contents when the above bill is paid," and keeps it from 28th March, when it became payable, to 13th May, when the giver of the note fails, it is good payment in A. Andr. 187.]

[A goldsmith's note, paid in at half past eleven, and not demanded till next day at two, is payment. Str. 1175.]

[And so a bill accepted, by writing an order on his goldsmith to pay it

it when due, is payment, if not tendered at the same time as a note or draft. Str. 1195.]

But, regularly, a bill or note given to a creditor shall not be a discharge of the debt, till payment ; unless it be accepted in discharge. 1 Sal. 124.

For, without an express agreement to take it in discharge, the acceptance is only, upon condition if it be paid. Sal. 442. Skin. 410. [1 T. R. 655. 7 T. R. 64. 2 Bos. & Pull. 518.]

So, if A. being indebted to B., indorse a bill of exchange, and send it to him ; it will not be a payment, though it continues in his hands a long time after it is payable. R. 1 Sal. 124.

And B. may afterwards sue A. for his debt ; and such bill shall not be allowed in satisfaction. Per Holt, 1 Sal. 124.

So, if a bill, sent to a goldsmith by a servant, be paid in in part, and another bill given for the residue ; the acceptance of the other bill by the servant will not be a payment for the residue ; if the other bill be not paid. R. Mod. Ca. 36. Sal. 442.

Though the master send his servant the next day to receive such bill. R. Mod. Ca. 36, 37.

So, if a bill, or note be given and received, generally, for a debt, it will not be a payment, if the goldsmith fails before the money paid ; though the goldsmith continues to pay for all the same day : for he, who takes it, is not bound to receive it immediately, but shall have a reasonable time for it. R. Sal. 442.

So, if a bill be given, generally, upon B., a goldsmith about ten in the forenoon upon Saturday ; and the receiver sends all his bills that day received by his servant, who receives several sums upon them, and enters them ; and then it was five in the afternoon, after which time it is not usual for goldsmiths to pay upon a Saturday, for then they adjust their accounts, for which reason he does not send the bill to B. by a servant till ten on Monday morning ; and B.'s cashier cancels the bill, and directs the servant to come half an hour afterwards : but then, and upon two subsequent demands, does not pay, but in the afternoon upon Monday gives another bill of the same date and for the same sum, at which time he was a bankrupt ; this bill will not be payment, though the servant was in fault, that he did not stay to receive the money when the bill was cancelled. R. Eq. Ca. [2d part of Mod. Ca.] 60.

[The common usage in transacting affairs of this nature is to be chiefly regarded ; so, where it is the custom of a company (as it was of the Bank, and of the Sword-Blade Company) to send their servant in the morning to leave the notes, and to call for the money in the afternoon, if the goldsmith has stopt payment after the notes left, it is not payment. Str. 416. contra. Str. 550.]

[A banker's note paid after dinner, and refused payment next morning at nine, is not payment. Str. 1248.]

[If defendant gives plaintiff a goldsmith's note at two in the afternoon, and next morning at nine it is tendered, a quarter of an hour after they had stopt, it is not payment. Str. 415.]

[If a man receives a goldsmith's note at twelve, puts it into the bank at one, next morning at ten it is carried with others for 2600*l.* and left as usual, called for at eleven, and at two payment refused, but

but they pay small notes for two hours after; this is not payment. Str. 910. (*d*)

**Feme Sole Merchant.** — Vide **BARON and FEME**, (A 2.) — **LONDON**, (N 7.)

**Statute Merchant.** — Vide **STATUTE STAPLE**.

## MESNE, WRIT OF.

Vide **DROIT** (K).

## MESSUAGE.

Vide **GRANT**, (E 6.)

## METROPOLITAN.

Vide **ADMINISTRATOR**, (B 3. 4.) — **ARCHBISHOP**. — **ECCLESIASTICAL PERSONS**, (C 1.) — **VISITOR**, (A 5.)

## MILK.

Vide **DISMES**, (H 8.)

(*d*) 1. Where, under an agreement, notes are to be taken in payment, and at the payee's risk, the demand is satisfied though they are dishonoured; *secus*, if they are not taken at his risk. 7 T. R. 64.

2. If, pursuant to a contract of, the vender takes in payment a check on the vendee's banker for a bill at three months, and instead of receiving a bill has the amount transferred from the vendee's account, and with his consent, to his own; on the banker's failing before the three months are expired, the vendee is discharged. 6 T. R. 139.

3. If a person take a draft upon another for payment of a debt, and hold it an unreasonable time before he demands the money, and the person upon whom it is drawn becomes insolvent in the interim, he cannot afterwards recover against the drawer. 2 Wils. 353.

4. The acceptance of a negotiable instrument on account of a debt, is, *prima facie*, a satisfaction, and may therefore be pleaded to an action demanding it. 5 T. R. 513. 517.

5. If a debtor, in payment of the debt, gives a bill drawn by himself, which is presented and dishonoured, but no notice of the dishonour sent to him; if he can shew that he had effects in the drawee's hands, the bill must be considered as payment. 3 M. & S. 362.

6. If one customer indorse and pay into a banker's a short bill drawn upon the banker by another customer, he does not, by overdrawing his account, make the bill, what it was not before, payment from the other customer. 2 B. & P. 518.

7. If, by the custom of a banking-house, stated periods are fixed at which bills drawn by one customer in favour of another, are carried as cash to the credit of the one and debit of the other, and the day of adjustment having passed without carrying a bill so drawn to the cash account of the payee, but having carried the amount to the debit of the drawer, the banker fails, the bill is not to be considered, not having been taken as payment between the parties.

**MILL.**

Vide Dismes, (H 12.)

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**SECTA AD MOLENDINUM.**

Vide Droit, (H).

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**MINES.**

Vide Waife, (H 1. 2.)

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**MISADVENTURE.**

Vide ACTION UPON THE CASE FOR MISFEASANCE, (A 4.) — JUSTICES, (M 19.)

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**MISCONTINUANCE.**

Vide Amendment, (I).

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**MISDEMEANOUR.**

Vide ACTION UPON THE CASE FOR MISFEASANCE, — ATTORNEY, (B 15.) — COURTS, (P 16.) — JUSTICES OF PEACE, (B 52. 62. 101.) — LEET, (L 2. &c.) — OFFICER, (G 14. — K 3.) — PARLIAMENT, (G 3. — L 34. 35. 44.) — PLEADER, (S 46. 47.) — PREROGATIVE, (D 54.)

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**MISFEASANCE.**

Vide ACTION UPON THE CASE FOR MISFEASANCE. — MISDEMEANOUR. — PLEADER, (2 O.)

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**MISNOMER.**

Vide ABATEMENT, (E 18. &c. — F 17. &c. — H 22, 23.) — PLEADER, (3 I 7.)

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**MISPRISION.**

Vide JUSTICES, (N 1. &c.) — JUSTICES OF PEACE, (B 2.)

**Misprision of the Clerk.** — Vide Amendment, (D 1. &c. — E 1, 2. F — G 1, 2. — H 3. — T 1. &c. — V 1., &c. and many other places in the same title).

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**MISTAKE.**

Vide ABATEMENT, (G 3. — H 25. &c.) — MISPRISION.



## MITIORI SENSU.

Vide ACTION UPON THE CASE for DEFAMATION, (F 16. &c.)

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## MITTIMUS.

Vide CERTIORARI, (A 2.)

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## MODUS DECIMANDI.

Vide DISMES, (E 10. &c.) — PROHIBITION, (G 10.)

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## MOLLITER MANUS IMPOSUIT.

Vide PLEADER, (3 M 16.)

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## MONASTERY.

### (A) How dissolved.

By the st. 27 H. 8. 28. all monasteries, and other religious houses of monks, canons, or nuns of whatever habit, rule, or order, not having lands, &c. or other hereditaments above 200*l. per annum*, and all their manors, lands, &c. and hereditaments, the king shall have and enjoy to him and his heirs for ever.

And all monasteries, abbeys, &c. given to his majesty by any abbot, &c. under the convent-seal within a year, or otherwise suppressed and dissolved: and all goods, debts, &c. belonging to the chief governor in right of his house, 1 Mar. 1535, or since.

And the king shall be in actual possession, &c. and may dispose of them at his will and pleasure.

And patentees, &c. shall enjoy, &c. according to tenor of their letters patent.

And all fraudulent estates in fee-tail for life or years, or charges, &c. within a year before, shall be void.

And by this statute appropriations to a religious house are also given to the king. R. per three J. 2 Cro. 608.

So, by the st. 31 H. 8. 13. the king shall enjoy to him and his heirs, all monasteries, &c. colleges, hospitals, and other religious and ecclesiastical houses, since 4th February, 27 H. 8. dissolved, given up, or by any means come to the king. And all their manors, lands, &c. and other hereditaments, or which shall hereafter be dissolved, &c.

By this act all religious and ecclesiastical houses, of whatever annual value, were given to the king. 2 Co. 49.

And though by the st. 32 H. 8. 24. the corporation of the knights of St. John of Jerusalem in England was dissolved, and their hospital and all manors, lands, &c. given to the king, yet their possessions were given to the king within the st. 31 H. 8. 13.; for it was a religious and ecclesiastical corporation. R. per three J. Jon. 183.

By

By the st. 1 Ed. 6. 14. all colleges, free chapels, and chauntries, and all manors, lands, &c. or hereditaments belonging to them, or which have been given or assigned to the finding of a priest, or of any anniversary or obit, &c. to have continuance for ever, shall be in the possession and seisin of the king.

If a monk now be professed beyond sea, he may inherit in *England*. Dub. Ca. Eq. [2d part of Mod. Ca.] 55.

Vide HOSPITAL.

## MONEY.

## (A) The Advantage of Money.

## (B) What shall be current Money.

(B 1.) What weight it ought to have. *infra*.

(B 2.) What alloy. p. 144.

(B 3.) Ought to have an impression. p. 144.

(B 4.) And a fixt denomination, or value. p. 144.

(B 5.) The authority of coinage belongs to the king. p. 145.

(B 6.) The king may make coin current. p. 146.

(B 7.) And change it at his pleasure. p. 146.

(B 8.) The effect of the change. p. 146.

## (A) The Advantage of Money.

*Moneta est mensura rerum, per quam omnium rerum, quæ in mundo sunt, fit justa estimatio.* Dav. 19.

## (B) What shall be Current Money.

(B 1.) What weight it ought to have.

Six circumstances ought to concur to make lawful and current money: a fixed weight, alloy, impression, and valuation, the king's authority, and proclamation. Dav. 19. b.

And, therefore, every piece of current money ought to have a certain weight. *Ibid*.

The pound troy of gold is divided into 24 carats, and every carat contains 4 grains of gold. Essay for amendment of the Coin, 17.

A pound troy of silver is divided into 12 ounces, every ounce contains 20 pennyweights, every pennyweight 24 grains. Essay, 18.

Payment in the exchequer was antiently made *ad scalam*, or *ad pensum*, viz. by weight: payment *ad scalam* was, when 6*d.* was added to every 20*s.*, to make due weight: *ad pensum*, when every thing necessary to make due weight was supplied, though above 6*d.* Mad. 187. Hale Sh. Accounts, 21, &c. [See 14 G. 3 c. 92.]

(B 2.)

## (B 2.) What alloy:

Gold and silver were anciently coined without alloy.

But now they have a certain proportion of alloy, whereby it is called sterling or standard money. Ess. for Coin, 17. Hale, Sh. Acc. 5. Hard. 501.

The ancient standard for gold temp. Ed. 3. *usqu.* H. 8. was, in every pound troy 23 carats 3 grains  $\frac{1}{2}$  of gold and  $\frac{1}{2}$  grain of alloy. Ess. 20. Hale Sh. Acc. 10.

The standard for silver was anciently and is now, in every pound 11 ounces and two pennyweights of silver, and 18 pennyweights of alloy. Ibid.

The sovereigns of gold, angels, &c. 34 H. 8. had in every pound one carat of alloy; and 37 H. 8. sovereigns four carats; but 4 Ed. 6. they were reduced to the ancient standard. Ess. 22.

So, 6 Ed. 6. 1 Mar. 2 El., sovereigns and angels were of the ancient standard. Other coin of gold had two carats alloy. Ess. 24.

So, 43 El. angels, 3 & 10 Jac. 2 Car. 1. and 12 Car. 2., rials and angels were of the ancient standard. Ess. 25. 26.

But other coin of gold, 35 and 43 El. 2 Jac. 2 Car. 1. and 12 Car. 2. unites, &c. and 22 Car. 2. guineas were and now continue with two carats of alloy. Ess. 25, &c.

So, coin of silver had, 34 H. 8. two ounces of alloy; 36 H. 8. six ounces; 37 H. 8. eight ounces; and 5 Ed. 6. nine ounces; but 6 Ed. 6. were reduced to 19 pennyweights of alloy; and temp. Ph. & M. to the ancient standard, which has continued from that time to this. Ess. 23.

Anciently, if money was paid at the exchequer, it was examined or an assay made of it, by burning some part. Mad. 187. 192.

Or, 12*d.* was added to every 20*s.* to countervail such assay. Mad. 192.

So, when coinage was used, viz. temp. Ed. 3. 12*d.* in every 20*s.* viz. 105*l.* was paid in respect of the alloy in sterling coin for every 100*l.* rent in fine silver, and it seems to have been settled by parliament. Hard. 501.

If the alloy exceeds the due proportion, whereby the coin is debased, that tends to the detriment of the public. 3 Rush. 1217.

## (B 3.) Ought to have an impression.

So, money ought to have an impression; for metal is not money without an impression; *et dicitur moneta quia impressione monet, cujus sit moneta.* Dav. 19. b.

## (B 4.) And a fixed denomination or value.

So every piece of gold or silver coin ought to have a certain denomination, or valuation set upon it. Dav. 19. b.

And the king by his prerogative may set upon his coin what value he pleases. Dav. 20. a. Vide post, (B 5. &c.)

The pound troy of gold, 18 Ed. 3. was divided into fifty florins to be current at 6*s.* each, and afterwards, *eodem anno*, ought to contain in it thirty-nine nobles and an half, at 6*s.* 8*d.* the noble. Ess. for Coin, 35.

20 Ed. 3. it was divided into 42 nobles of the same value; 27 Ed. 3. 45 nobles; 9 H. 5. 50 nobles. Ess. 36.

1 H. 6. it was advanced to 45 rials of 10s. the rial, or 67 angels and  $\frac{1}{2}$  of 6s. 8d. the angel; but reduced 4 H. 6. to the same standard as 9 H. 5.; yet 49 H. 6. and afterwards 5 Ed. 4. advanced as before. Ess. 38.

1 H. 8. it was divided into 24 sovereigns at 22s. 6d. or 48 rials at 11s. 3d., or 72 angels at 7s. 6d. Ess. 41.

34 H. 8. it was divided into 28 sovereigns; and 36 H. 8. into 30 sovereigns at 20s. *per* sovereign; 3 Ed. 6. into 34 sovereigns; and 6 Ed. 6. into 24 sovereigns at 30s. *per* sovereign, or 72 angels at 10s., and 43 El. into 73 angels. Ess. 43.

The pound which had two carats alloy was divided 6 Ed. 6. and 2 El. into 33 sovereigns at 20s. *per* sovereign; and 43 El. into 33 $\frac{1}{2}$ ; and 2 Jac. into 37 unites at 20s. and one thistle crown at 4s. Ess. 48.

The pound of the ancient standard 3 Jac. was divided into 81 angels; 10 Jac. [into 88 angels,] and 2 Car. into 89 angels; and the pound of two carats alloy 10 Jac. was divided into 37 unites at 22s. and one thistle crown at 4s. 4d.; and 2 Car. 1. into 41 unites at 20s. Ess. 53.

The pound was divided 22 Car. 2 and still continues, into 44 guineas and a half, at 20s. the guinea. Ess. 55.

The pound troy of silver 28 Ed. 1. was divided into 20s. and 3d., 20 Ed. 3. into 22s. 6d., 27 Ed. 3. into 25s., 9 H. 5. 30s., 1 H. 6. 37s. 6d., which was reduced to 30s., 4 H. 6.; but 49 H. 6. advanced to 37s. 6d., and 1 H. 8. to 45s., 34 H. 8. 48s., 3 Ed. 6. 72s.; but 6 Ed. 6. it was reduced to 60s., and 43 El. advanced to 62s., and so from thence hath continued. Ess. 34, &c.

The penny was 20<sup>a</sup> *pars uncie*; 9 Ed. 3. 26<sup>a</sup> *pars*; 2 H. 6. 32<sup>a</sup> *pars*; 5 Ed. 4. 40<sup>a</sup> *pars*; 36 H. 8. 45<sup>a</sup> *pars*; 2 El. 60<sup>a</sup> *pars*; and so remains to this day. Hale, Sh. Acc. 12.

### (B 5.) The authority of coinage belongs to the king.

By the civil law, *jus cudendæ monetæ ad solum principem de jure pertinet*. Dav. 20.

So, by the common law, the power to make or coin money within his dominions belongs only to the king. R. Dav. 19. a. Hale, Sh. Acc. 3.

But by a grant from the emperor, the inferior princes and states of Germany have the privilege of coining. Dav. 20. b.

And the same privilege was granted to several great personages in France. Ibid.

So, anciently, the archbishop of York, and bishop of Durham might coin. Ibid.

So, temp. Steph. through the confusion of the times, *tam episcopa quam comites et barones suam faciebant monetam*. Hale, Sh. Acc. 4.

[By 12 Geo. 2. c. 5. 15,000*l.* *per annum* is given to the king for seven years, for the coinage; made perpetual, by stat. 9 Geo. 3. c. 25.]

[Stat. 14 Geo. 3. c. 70. directs the taking of light gold coin, under certain regulations, and recoining the same.]

## (B 6.) The king may make coin current.

So, the king by his proclamation may make any coin current in England. 5 Co. 114. b.

As, a talent or bezant of uncertain value, and may set a value upon it. Dav. 20. a.

May establish the standard as he pleases. Dav. 19. b.

So, coin impressed at the mint shall be of value proportionable to other coin, without proclamation. Per Holt, Sal. 446.

## (B 7.) And change at his pleasure.

So, the king may enhance, debase, or change the coin at his pleasure. Dict. that he cannot change it without assent of the counties. Mir. Jus. 10. b. 2 Rol. 166. l. 35.

But it is now allowed that he may change it as he pleases. R. Dav. 20. b.

That he may advance the value. Vide ante, (B 4. 6.)

So, he may debase it at his pleasure. Dav. 21.

And if the king by proclamation makes a mixed or base money current, it shall be so. R. Dav. 22. b.

So, the king by his proclamation may change, &c. his money in Ireland, as well as in England. Dav. 21.

## (B 8.) The effect of the change.

If the king by proclamation decries any coin, it cannot afterwards be tendered as money, but shall be only bullion. Dav. 20. b.

If he makes base money current, it shall be taken as sterling. R. Dav. 22. b. 25.

And therefore, if an obligation be to pay so much in current money at such a day, and before the day the money be enhanced by proclamation, payment or tender of the sum in the enhanced money is sufficient. R. Dav. 26. b.

Though the obligation was made in England, for payment in Ireland, and the money is enhanced there only; for the time and place of payment shall be principally regarded. R. Dav. 25. b. 27, 28.

Though the money was tendered after the day of payment, and before the enhancement; for there was a default by not tendering it at the day. Semb. Dy. 83. a.

So, if an obligation be to deliver so much corn, which before the day is diminished in value. Dy. 82. in marg.

But if money be tendered in pure coin at the day, and afterwards the money is debased, he shall have the value of the coin current at the time of the tender. Semb. Dav. 27. Dy. 82. b.

Or, if one receives pure coin, and is afterwards bound to a restitution. Dub. Dav. 27. b.

So, if a receiver, who ought to pay upon request, receives pure coin, which, before the request, is enhanced. Per two J. Dy. 83. a. in marg.

So, if A. draws a bill of exchange to pay 100 rees-dollars to B. in Portugal, at such a day, and before the day, after the bill drawn, the king of Portugal enhances the rees; if the rees are not paid, as current  
at

at the date of the bill, B. may protest the bill, and resort to the drawer; for a foreign prince cannot alter the property of a subject of England. R. Skin. 272.

[ (C) *Offences against the coin.*

[Vide in JUSTICES.]

[The exchanging guineas for bank notes, taking the guineas in such exchange at a higher value than they were current for by the king's proclamation is not an offence against 5 & 6 Edw. 6. c. 19. 14 East, 402.]

[An indictment on st. 15 Geo. 2. c. 28. s. 3., (q. v.) need not specifically aver that the defendant is a common utterer of false money. 2 B. & P. 127.]

[Construction of 8 & 9 W. 3. c. 25. 2 Blk. 807.]

Vide Abatement, (D 8.)

**Penalty for counterfeiting money, or bringing false money into the kingdom.** Vide JUSTICES, (K 7.)

**Money decreed in specie.** Vide CHANCERY, (4 W 10. 16.)

**Bringing money into court.** Vide PLEADER, (C 10.)

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**MONK.**

Vide ECCLESIASTICAL PERSONS, (B 2, &c.)—MONASTERY.

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**MONOPOLY.**

Vide BYE-LAW, (B 3. — C 3.)—TRADE, (D 4.)

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**MONSTRANS DE DROIT.**

Vide PRÆROGATIVE, (D 81, 82.)

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**MONSTRANS DE FAITS.**

Vide PLEADER, (O 1, &c.)

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**MONSTRAVERUNT.**

Vide ANCIENT DEMESNE, (H.)

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**MONTH.**

Vide ANN. (B)

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**MONUMENT.**

Vide CEMETERY, (C.)

## MORT D'ANCESTOR.

Vide ASSISE, (C 1, &amp;c.)

## MORTGAGE.

(A) Mortgage, by pledge of goods. *infra*.

(B) At what time it shall be redeemed. p. 149.

[(C) Effect of the mortgage becoming absolute.] p. 149.

## (A) Mortgage, by Pledge of Goods.

A mortgage, *quasi mortuum vadum*, is when things moveable or immoveable, as goods or lands, are pledged, as a security for repayment of money. Co. L. 205. a. Blo. Nom. verb. Mortgage.

If goods are pledged for the security of money, the pawnee has special property in them. Sal. 522. R. Ow. 124.

If the custody of the goods is a charge to him, he may use them as a recompence for his charge; as, he may ride an horse put in pledge. Sal. 522. R. per three J. Ow. 124.

So, though the custody be no charge, if the using is no prejudice to the goods, he may use them, but it shall be at his peril if he loses them. Sal. 522. Ow. 124.

If a cow be pledged, he may milk her. Ow. 124.

So, if the pawnee lose the goods without any default in him, it shall be the loss of the owner, and the pawnee shall have an action against him for the money. Sal. 522. Vide post, (B).

So, the pawnee has such a property as he may assign to another. Ow. 124.

But by tender of the money, his property is determined, and the pledge ought to be restored. Sal. 522, 523. R. 2 Cro. 245. Yel. 178.

And if he refuses to restore the pledge upon tender of the money, trover lies against him. Sal. 522. R. 2 Cro. 245. Vide Action upon the Case upon Trover (D).

So, he may be indicted; for perhaps it was delivered in secret without witnesses. Per Holt, 1 Sal. 522.

So, if the pawnee be robbed of the goods after tender, he shall answer for them. Sal. 523.

So, if he loses them by his using them. Sal. 522.

So, if the using be a prejudice, he cannot use them. Ibid.

So, if a pawnee assign the goods pledged to another, detinue lies by the owner, if he detains them after the money tendered to him. Ow. 124.

So, goods pledged cannot be taken in execution for the debt of the pawnee. Ibid.

[Where money is generally lent on a pledge, it does not deprive the lender of his remedy against the person, unless a special agreement to stand to the pledge only. *South-Sea Company v. Duncomb*, M. 5 G. 2. Str. 919.]

[After foreclosure and sale, the mortgagee may bring an action for the residue. 2 Brown, Ch. Rep. 125.]

[A mortgage of goods and choses in action is fraudulent as against creditors,

creditors, if the goods, &c. be not delivered to the mortgagee. 1 Wils 260. 2 T. R. 587.]

[But a delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself. 2 T. R. 462.]

[A ship at sea may be mortgaged, and if mortgagee takes proper methods to get it in possession, as bill of sale, &c. it will not be within stat. Ja. 1.; otherwise, if he suffers the ship to go on another voyage. Ex parte Matthews, P. 1751, 2 Ves. 272.]

[*Quære*. Is a mortgagee of a ship out of possession liable for the repairs? *Westerdell v. Dale*, B. R. T. 37 Geo. 3. 7 T. R. 306.]

### **(B) At what time it shall be redeemed.**

If a man pledge goods for money lent, he may redeem though he does not come at the day fixed for payment.

So, if no day be appointed for payment, he may redeem at any time. 2 Cro. 245.

So, if the pawnee die, he may tender the money to his executor or administrator. 2 Cro. 245. Yelv. 178. 1 Bul. 29.

So, if he that pledges dies, his executor or administrator may tender the money. Dub. 2 Cro. 245.; for it was said, that the condition is personal, and it ought to be redeemed during his life. Yelv. 178. 1 Bul. 29.

If a day be appointed for redemption, and he that pledges dies before, his executor may redeem. 1 Bul. 29.

If a man that pledges goods be attainted, the king, upon payment, may redeem. Yel. 179. 1 Bul. 29.

If a man pledges goods to A. and in his sickness his wife with his consent delivers the goods to B., and if after the death of A. the money be tendered to his executor, and B. afterwards refuses delivering them, trover lies against him; for B. had the custody only, and not any property. R. 2 Cro. 244. Yel. 178. 1 Bul. 29.

So, if the goods are delivered to B. upon consideration; for B. was not privy to the delivery upon the first contract, or to the condition. Yel. 178.

But by 1 Bul. 29. it seems as if then the tender ought to be to B.

If a man pledges goods perishable, and does not redeem them till they are perished, (no time being fixed for the redemption,) debt lies for the money. Per Ch. J. and not denied by the Court. Yelv. 179.

So, if the pawnee lose them without his default. Sal. 522.

[A pawnbroker has no lien on plate, after the death of tenant for life, who pawned it with him, as against the remainder-man, although the pawnee had no notice of the settlement. *Hoare v. Parker*, B. R. E. 28 Geo. 3. 2 T. R. 376.]

### **[(C) Effect of the mortgage becoming absolute.**

If the mortgagee of goods, after the mortgage has become absolute, receive instructions from the mortgagor to insure them, he must if he intends to refuse, give notice to the mortgagor, that he may apply elsewhere, otherwise he will be taken to have assented. 2 T. R. 187.]

### **[(D) Regulation of pawnbroking.]**

[Vide 10 G. 3. c. 49.]



**Mortgage of Land ; what shall be, and how redeemable.—**  
Vide CHANCERY, (4 A 1, &c.

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**MORTMAIN.**  
Vide CAPACITY, (B 2. 3.)

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**MORTUARY.**  
Vide PROHIBITION. (G 11.)

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**MULIER.**  
Vide BASTARD, (F).

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**MURAGE.**  
Vide TOLL, (A).

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**MURDER.**  
Vide ADMIRALTY, (E.) — JUSTICES, (M 1, &c. — Y 5.)

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**MUTUAL AGREEMENTS.**  
Vide PLEADER, (C 53, 54, 55.)

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**MUTUAL REMEDIES.**  
Vide PLEADER, (C 56.)

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**NAME.**  
Vide ABATEMENT, (E 18, &c. — F 17, &c.) — CAPACITY, (B 4, 5.) —  
FAIT, (B 1. — E 3, 4.) — FINE, (E 4.) — FRANCHISES, (F 9.) —  
GRANT, (A 2. — E 1, &c.) — PARLIAMENT (A). — PROCESS, (A 2.)

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**NATIVO HABENDO.**  
Vide VILLENAGE, (C 1.)

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**NATURALIZATION.**  
Vide ALIEN, (B 2.)

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## NAVIGATION.

Vide PARLIAMENT, (H 25.)

- (A) The sea. *infra*.
- (B) An arm of the sea. p. 152.
- (C) A creek. p. 152.
- (D) An haven. p. 152.
- (E) A port. p. 152.
- (F) Islands. p. 153.
  - (F 2.) Isle of Man. p. 153.
  - (F 3.) Jersey. p. 156.
  - (F 4.) Guernsey. p. 157.
  - (F 5.) Isle of Wight. p. 157.
- (G) The plantations.
  - (G 1.) Their government. p. 157.
  - (G 2.) Courts. p. 158.
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- (H) Beacons, &c. p. 159.
- (I 1.) Navigation shall be free. p. 159.
  - (I 2.) But it shall be in English ships, &c. p. 160.
  - (I 3.) Owner of ship. p. 162.
  - [(I 3. a.) Who shall be, &c.] p. 162.
  - [(I 3. b.) The major part of the owners over rules all.] p. 164.
  - (I 4.) Master. p. 164.
  - (I 5.) Mariners. p. 166.
  - [(I 6.) Supercargo.] p. 168.
- [(K) Navy.] p. 168.

## (A) The sea.

Navigation is used upon the sea, or navigable rivers.

The sea is, where the water flows and reflows, and is so spacious, that a man cannot see land from one shore to the other. 2 Rol. 169. l. 20. Vide Admiralty.

The king has the property *tam aquæ quam soli*, and all profits in the sea, and all navigable rivers. Cal. 17. Dav. 56, 57.

The jurisdiction and interest of the king extends over the whole sea between Britain and Ireland. 3 Leo. 73.

So, between Britain and France. Ibid.

So, to the middle of the sea between Britain and Spain. Ibid.

So, the property of the soil in all rivers, which have the flux and reflux of the sea, belongs to the king, and not to the lord of the manor adjoining, without grant or prescription. 1 Sid. 148. [Doug. 441.]

[The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded either on statute or on usage. 3 T. R. 253.]

So, the soil between high water-mark, and low water-mark, is part of the county, and may be within a manor. Semb. 1 Ann. 89.

As to fishery in the sea, or rivers, vide Prærogative, (D 50.) — Piscary (A).

As to the sovereignty of the sea, vide Prærogative, (B 1.)

### (B) An Arm of the sea.

An arm of the sea is, where the sea flows and reflows. 2 Rol. 169. l. 12.

And every arm of the sea, or navigable river so high as the sea flows and reflows, belongs to the king, and he has the same property therein as *in alto mari*. Dav. 56. 2 Rol. 170. l. 20.

But, by grant, or prescription, a subject may have the interest in the water and soil of navigable rivers; as the city of London has the soil and property of the Thames, by grant. R. Dav. 56. b.

### (C) A creek.

A creek is an inlet of the sea, extending within the land, which gives no harbour to ships, nor is endowed with any privileges. Cal. 34.

### (D) An haven.

An haven is an harbour for ships; but it is not necessary that it should have privileges annexed to it. Cal. 34.

All havens and ports are *infra corpus comitatûs*. 4 Inst. 148.

And the water, banks, &c. within ports and havens, are within the power of the commission of sewers. Cal. 38.

[By stat. 19 Geo. 2. c. 22. ballast shall not be thrown out into any haven, port, road, channel, or navigable river, but only on land where tide or water never flows or runs, on pain of from 5*l.* to 50*s.* before one justice.]

[If a ship is sunk or stranded, the owner shall give security to remove it, or one justice may sell it, and with the money remove it, and render the surplus to owner.]

Putting ballast into an hopper, with an intent to have it carried into the high and open sea, and its being thrown into the sea at fourteen fathom deep, is an offence against 19 Geo. 2. c. 92. Brucklesbank v. Smith, M. 32 Geo. 2. 2 B. M. 656.]

Vide post, (E).

### (E) A port.

*Portus est locus, in quo exportantur et importantur merces.* 4 Inst. 148.

Every haven and port of common right belongs to the king. Dav. 56.

And it is part of the king's prerogative to create ports, which was lately exercised at Liverpool. By Ld. Kenyon Ch. J. Ball v. Herbert, B. R. E. 29 Geo. 3. 3 T. R. 261.]

And a grant to the subject is not good; for a subject cannot have it. 1 Rol. 5.

Every port is an haven for ships, which enjoys several privileges by prescription, or the king's grant. Cal. 34.

By the st. M. c. 9. *barones de 5 portubus, et omnes alii portus habeant omnes libertates, et consuetudines suas.*

A port has usually a port-reeve, and port-mote. 4 Inst. 148.

By the st. 1 El. 11. no wares, &c. shall be exported or landed, unless  
fish

fish and salt, but at some open place, quay, or wharf, as by commission shall be appointed, &c.

And by the st. 13 & 14 Car. 2. 11. a commission out of the exchequer shall go from time to time to assign such ports for landing or shipping goods, &c. and to appoint the limits of such port, &c. And none shall ship any goods or land them, fish, coal, stone, or bestials except, but at such port, &c. [Vide Case of the extension of the London wharfs. 1 Blk. Rep. 581.]

[By st. 22 Car. 2. c. 11. s. 21. such rates and no other shall from time to time be taken for wharfage and cranage, as, by his majesty with the advice of his privy council shall be assessed and allowed to be taken; a table of which rates shall be hung up at every one of the wharfs to be appointed in consequence of that statute.]

[By st. 44. there shall be left a continued tract of ground from London Bridge to the Temple, of the breadth of forty feet of assize from the north side of the Thames, to be converted to a quay, or public and open wharf.]

[By st. 45. the said tract of ground shall lie open and at large, without any division or separation, and the bounds of each proprietor's ground therein shall be distinguished only by denter-stones to be placed in the pavement thereof; and no lighter, boats, or other vessel, shall lie before any the said wharfs or quays between the places aforesaid, on the north side of the river, longer than shall be necessary for the lading or unlading of goods, without the consent and permission of the wharfingers or proprietors thereof.]

[By st. 46. any person may lade or unlade any goods or merchandise at any of the said wharfs or quays for wharfage or cranage, whereof every proprietor, wharfinger, or other person concerned, shall and may demand and receive such rates and no other, for the same, as shall from time to time be set out and appointed by his majesty, with the advice of his privy counsel.]

[This statute does not give a right to the wharfingers which they had not by common law, and therefore they are not entitled to wharfage for goods unladen into lighters out of barges though fastened to their wharfs. 1 Blk. 413. 423.]

### (F 1.) Islands.

An island is defined by the imperial law to be *locus undique circumdatus aquis*. Cal. 20.

### (F 2.) Isle of Man.

The Isle of Man was anciently governed by its own king, who was subject to the king of England. Cal. 20. 4 Inst. 283. 7 Co. 21. a. Calvin.

And being a kingdom of itself, is no part of the realm of England. 4 Inst. 201. 283. R. 40 El. 4 Inst. 284.

But the lord of this isle is called king, and has a crown of gold. 4 Inst. 283.

Anno 18 Ed. 1. it was granted to Walter de Huntercomb; by Ed. 2. to P. Gaveston; and afterwards to H. de Bellomonte. 4 Inst. 284.

A. D. 1393, 17 R. 2. William lord Scroop purchased it of W. lord Montacute. 4 Inst. 283.

1 H. 4. Wm. lord Scroop forfeited it for high treason, and the forfeiture was confirmed by act of parliament. 4 Inst. 283.

And afterwards, H. 4., by letters patent, granted *insulam, castrum, pelam, et dominium de Man*, and all isles belonging thereto, to Hen. earl of Northumberland and his heirs. 4 Inst. 283.

And when, by the attainder of Hen. earl of Northumberland, 5 H. 4. it came to the king, and was confirmed by parliament, the king, 7 H. 4., granted it *una cum patronatû episcopatus* to Sir John Stanley, for life and afterwards to him and his heirs. Ibid.

Sir John Stanley was grandfather to Hen. lord chamberlain to H. 6. and by him created lord Stanley. Ibid.

Hen. lord Stanley was grandfather to Thomas, created by H. 7. earl of Derby, to him and the heirs male of his body. 4 Inst. 283, 284.

And therefore, it shall be grantable by the king's letters patent. Co. L. 9. a. 4 Inst. 284. 2 And. 115, 116.

And when granted, it descends according to the rules of the common law. R. 4 Inst. 284. Co. L. 9. a.

So, the king by patent may enable the governor to make a justice there. Pal. 345.

And the construction of the patent shall be determined by the common law. Ibid.

But no one has an estate of inheritance there, except the lord, and the bishop. 2 And. 116.

And the bishop there is not created by *congè d'elire*, but by presentment of the king of Man. Pal. 345.

In the kingdom of Man are two castles, 17 parishes, four markets, and many villages. 4 Inst. 283.

A bishop was there appointed by Gregory 4th, who is subject to the archbishop of York. 4 Inst. 285.

The inhabitants have a peculiar language. Ibid.

And are governed by their own laws: by their ecclesiastical law they are cited, the cause determined, and within eight days they obey, or are imprisoned. 4 Inst. 285. 2 And. 116.

Every contract shall be completed *per traditionem stipulæ*. 4 Inst. 285.

And this upon a contract for lands, as well as for personal things; for the parties appear in court, declare the contract, and deliver a straw in seisin, and the contract is recorded.

Anno 1583, by a law in the same isle, a sale of lands without licence of the lord, or his council, or three of them, *viz.* his lieutenant, receiver, and comptroller, shall be void, and each party forfeits 3*l.*; such licence to be made by the clerk of the rolls, and to be under the hand of the council, or those three of them.

And now, though made *per traditionem stipulæ*, if it be not with licence, &c. it will be void. R. at a court within the isle, 1611, inter Callow and Sir Hugh Cannel. R. 14 May, 1641, inter Thompson and Calister.

But if made with licence, &c. without *traditionem stipulæ*, it will be void.

So in the isle of Man taking a capon, or pig, &c. will be felony. 12 H. 8. 5. a.

But not taking an horse, or ox; for they cannot hide them. Ibid.

An act of parliament in England does not bind them, unless they are expressly named. R. 4 Inst. 284. R. 2 And. 116. 4 Mod. 223.

And

And therefore, the st. W. 2. *de donis* does not extend to them. R. 4 Inst. 284.

Nor the st. 27 H. 8. 10. of uses. 4 Inst. 284. 2 And. 116.

Nor the st. 32 & 34 H. 8. of devises by will. 4 Inst. 284. 2 And. 116.

So, *breve domini regis* does not run there: and therefore, a wife cannot sue to be endowed there. 4 Inst. 384.

An office upon a death cannot be sued out of chancery. Ibid.

Nor any office to entitle the king. 4 Inst. 284. 1 Rol. 246.

Yet the king by commission under the great seal may seize lands forfeited to him, which, being returned upon record, gives seisin to the king. R. 4 Inst. 284.

So, the king may grant a commission for redress of wrong, but the commissioners must proceed according to the law there. 4 Inst. 285.

So, an appeal lies to the king from a judgment there, *ut superiori domino*. R. coram concilio Jan. 1716, inter Christian and Corrin. Acc. Vau. 281.

So, the judges will take notice of the laws of the Isle of Man. Pal. 345.

So, the Isle of Man appertains to the crown of England, though it be not parcel, nor held of it. Per Co. 1 Rol. 246.

[The Isle of Man is not part of the realm of England, but parcel of the king's crown of England, held as a feudatory dominion, by liege homage of the kings of England. Earl of Derby v. duke of Athol, T. 1751. 2 Ves. 337.]

[A question relating to the right and title to the Isle of Man, may be determined in England, in chancery, the king's bench, or (*quæ*.) before the king in council. Earl of Derby v. Duke of Athol, H. 1748, 1 Ves. 202.]

[By letters patent 7 J. 1. a grant was made by the crown of the Isle of Man, and of all the rectories and tithes, by name, to William earl of Derby for life, to his wife for life, to their son James lord Stanley in fee, to be held of the king by liege homage, rendering immediately after that homage two falcons, and so to his successors every coronation-day two falcons; this is a socage-tenure, and (*semb.*) petty serjeanty. Earl of Derby v. Duke of Athol, T. 1751. 2 Ves. 337.]

[By private act of parliament, 7 J. 1. William earl of Derby, and his wife for life, and the longest liver; then their son James, and the heirs male of his body; then Robert Stanley, and the heirs male of his body; then the heirs male of the body of earl William; then the right heirs of James lord Stanley shall hold against the king, &c. and against the widow and daughters of earl Ferdinand, (earl William's elder brother,) all the Isle of Man, with the appurtenances: and neither James, nor the heirs male of his body, nor Robert, nor the heirs male of his body, nor any of the heirs male of William, shall have power to alien it, but it shall continue as above limited; only they may make leases, as tenants in tail may do in England by st. H. 8.]

[In 1666, Charles earl of Derby makes a lease for 10,000 years, of the rectories and tithes in Man for the benefit of the poor clergy; and by deed, as collateral security, conveys lands in Lancashire, in trust,

trust, to permit him and his heirs to hold said lands, and receive the rents, till interruption in receipt of the rectories and tithes by him or those claiming under him or his ancestors, and then to enter and receive.]

[In 1735, James earl of Derby (heir male of James lord Stanley, in the grant and act mentioned) devises to Sir Edward Stanley (who on his death became earl of Derby, and his heirs for ever) all his honours, real estate, and hereditaments, whatsoever and wheresoever.]

[In this James ended the male-line of earl William.]

[The devise in 1735 was void, by force of the private act of parliament, whereupon the Isle of Man descended to James Duke of Athol, as right heir of James Lord Stanley, (afterwards earl of Derby, beheaded at Bolton in Lancashire in 1651,) being his great-grandson by Charlotte his third daughter.]

[The lease of the rectories and tithes was also void, and the trustees were entitled to the rents of the lands in Lancashire, from the time the tithes were evicted by the duke of Athol. Earl of Derby v. Duke of Athol, T. 1751, 2 Ves. 337.]

[By st. 5 Geo. 3 c. 26. in consideration of 70,000*l.* to the duke and duchess of Athol, the island, castle, pele, and lordship of Man, and all royalties, &c. are unalienably in his majesty; except the land-property rights, as lord of manors, patronage of bishopric, &c.]

[By st. 5 G. 3. c. 30. bounties on corn exported from Britain or Ireland to Man, are discontinued.]

[Stat. 5 G. 3. c. 39. provides against smuggling with the Isle of Man.]

[Stat. 5 G. 3. c. 43. permits importation of several commodities of Man, and grants bounties on linens made in Man, and exported from Britain.]

[Stat. 6 G. 3. c. 50. extends the act 29 Car. 2. relating to taking affidavits in the country, to the Isle of Man, and empowers the king to appoint ports therein for landing and shipping goods.]

[Stat. 7 G. 3. c. 45. encourages and regulates the trade and manufactures of Man.]

[Stat. 11 G. 3. c. 52. provides for repairing the harbours in Man.]

[Stat. 12 G. 3. c. 58. is for encouraging the herring-fishery of Man.]

### (F 3.) Jersey.

The islands of Jersey and Guernsey were parcel of the duchy of Normandy, and with that united to the realm of England by H. 1. after the conquest of Robert his brother. 4 Inst. 286.

And though Normandy was lost by king John, and afterwards the loss confirmed by H. 3., yet these islands continue part of the dominion of England. 4 Inst. 286.

Jersey anciently was Gearsey, *olim Cæsarea*, Ibid.

And had *temp.* Jac. 12 parishes and 4 castles. 4 Inst. 287.

But these islands are not parcel of the realm of England. 7 Co. 21. a. Calvin.

It seems to be meant that they were not so originally. Cont. Seld. de Ma. Cl. 4 vol. 1351. Acc. App. H. Jer. 440.

Jersey is governed by its own laws and customs. 7 Co. 21. a. Calvin.

And

And the king's writ does not run there. 4 Inst. 286.

The usual way of proceeding there is according to the customs of Normandy. Ibid.

But King John *constituit 12 coronatores ad placita et jura coronæ conservanda, et concessit quod ballivus per visum coronator. placitare sine brevi poterit de assisa novæ disseisinæ, de morte antecessor., et de dote, infra annum.* 4 Inst. 286. App. H. Jer. N.1.

The twelve coroners are elected by the country upon death, and sworn and ought with the justices, or (if they are absent) by themselves, *judicare de omnibus casibus insulâ emergent. (exceptis nimis arduis, as high treason, &c.) amerciamenta taxare.* App. *ibid.*

*Placitum insulâ coram aliquibus just. inceptum non debet extra insulam adjornari.* App. *ibid.*

*Nullus de tenemento quod per annum et diem quiete tenuit, sine brevi de cancel. responderet teneatur.* App. *ibid.*

*Nullus debet imprisonari in castro, nisi in causâ criminali, et hoc per judicium coronator. jurat.* App. *ibid.*

So, a commission and grant of the king under the great seal has its force there. 4 Inst. 286.

[The royal court of Jersey cannot transmit a cause to the king for difficulty, but must proceed to judgment. *Magons v. Dumaresque*, M. 13 G. Lord Raym. 1448.]

The king granted the isle, royalty, and government there. Vide App.

The king grants the office of baily, that he shall not be named by the governor. Vide App.

[By stat. 9 G. 3. c. 28. Jersey and Guernsey may export to America, directly, goods necessary for the fishery; and import non-enumerated goods, except rum.]

#### (F. 4.) Guernsey.

So, Guernsey was united with Normandy to the crown of England, temp. H. 1. and has so continued. 4 Inst. 286. Vide ante, (F 3.)

And has been governed as Jersey by its own laws. 4 Inst. 286.

#### (F 5.) Isle of Wight.

The isle of Wight is part of the county of Hampshire, and governed by the laws of England. 4 Inst. 287. Cal. 21.

### (G) The plantations.

#### (G 1.) Their government.

The plantations are colonies of the kingdom of England, which belong to the crown and kingdom, and are part of their dominion. Ca. Parl. 31.

The inhabitants there are within the king's allegiance, and subject to the laws of England. Ca. Parl. 32. Vide Ley, (C).

The king by his letters patent constitutes a governor.

And he must act pursuant to law.

And for misfeasance shall be punished by action at law. Adm. Ca. Parl. 30.

So, if a governor there makes a provost-marshal, or other officer of justice there, he may make a deputy. 4 Mod. 222.

And



And upon the deputation may reserve an annual rent with covenant, &c. to pay, and it will not be within the st. 5 (or 5 and 6) Ed. 6. 16. against the sale of offices. R. 4 Mod. 222.

[Proprietors of provinces may settle boundaries between themselves, as the lords marchers and counties palatine might do. And this is not an alienation, for these shall be presumed the true and antient limits. Penn v. Lord Baltimore, 1750, 1 Ves. 444.]

### (G 2.) Courts.

In Virginia, by a statute there, 1662, c. 19. the governor and council shall hold a general court thrice a-year, viz. 20 March for eighteen, 20 September and 20 November, for twelve days each, and shall sit each day from eight to eleven in the morning, and from one to three in the afternoon.

By stat. 1666, c. 3. first court shall begin 15 April instead of 20 March.

By stat. 1662, c. 31. by commission in each county, four most judicious shall act as justices of peace, (one qu.) according to the laws of England, whose courts shall be called county courts, and each justice not attending, unless just cause, forfeits 300lb. of tobacco.

By c. 25. the governor and one or two of the council commissioned by him, shall go the circuit yearly in August, and determine all causes then depending in the county courts, provided no counsellor go in the river where he inhabits.

By stat. 1662, c. 26. general court shall take cognisance of no cause under 20s. or 200lb. of tobacco.

Causes under, any justice may hear and determine.

The action shall be entered, and by the stat. 1662, c. 32. till then no sheriff shall arrest, on pain of 500lb. of tobacco.

By c. 22 & 33. plaintiff shall file a declaration three days at least before hearing in the general and county courts, to which an answer shall be put in, in writing.

By st. 1663, c. on the day for hearing, the plaintiff, upon call, not appearing, shall be nonsuit, and the defendant, upon call, not appearing, shall have judgment against him.

So, by st. 1662, c. 4. on *non inventus* returned, judgment shall be for what the plaintiff swears due; so, against bail.

By the st. 5 G. 2. 7. if a suit depends in the courts of law or equity in any of the plantations for a debt to the king, or debt, or account, where any residing in Great Britain is party, the plaintiff or defendant, or a witness to be made use of, may prove any matter by affidavit, or if a quaker by affirmation, made before the mayor, &c. of a corporation, city, or borough, which transmitted under the common seal or seal of office, shall be of the same force, as if the party was examined *vivâ voce*, &c.

And by the same statute, houses, lands, negroes, &c. in any of the plantations, shall be liable to the debt of the king, or any of his subjects, and shall be assets in like manner as real estates to a debt on specialty, and shall be seized, sold, &c. as personal estates are in the plantations.

[If a party appeals from a court in one of the plantations to the privy-council, he must procure the proceedings to be transmitted, and proceed

proceed within a year after the appeal allowed in the plantations, or the appeal will be dismissed with 5*l.* costs, without notice to the appellant. *Gordon v. Lowther*, M. 13 G. Ld. Raym. 1447.]

[The original jurisdiction as to the boundaries of provinces in America is in the king in council, but by the contract of the parties, as by executing articles in England, the courts in England may have jurisdiction. *Penn v. Ld. Baltimore*, P. 1750, 1 Ves. 444.]

### (G 3.) Laws.

The laws of the plantations are the same, by which they were governed before their conquest, or accession to England, except where new laws are obtained since their conquest. R. 4 Mod. 225. Vide *Ley*, (C).

And if new laws are given, their antient customs, if not abolished, may remain. 4 Mod. 225.

And therefore, a new statute made since their conquest, does not bind them, unless they are particularly named. R. 4 Mod. 225.

### (H) Beacons, &c.

For the direction of mariners, beacons, light-houses, and sea-marks are erected. 4 Inst. 148.

Before the time of K. Ed. 3. stacks of wool were burnt to give notice of the approach of enemies upon the coast, and in his reign, beacons. 4 Inst. 148.

Light-houses are *phari*, built for the direction of mariners in the night. Ibid.

Sea-marks are steeples of churches, castles, trees, &c. for their direction by day. Ibid.

By the common law, the king could only direct the erecting of any of these by his commission under the great seal. Ibid.

But now the king, by his letters patent, grants a power to the admiral to erect. 4 Inst. 149.

And by the st. 8 El. 13. the corporation of the Trinity-house at Deptford may erect so many beacons, and sea-marks on the sea-coast as to them shall seem meet. Ibid.

By custom, a customary payment, called beaconage, is due in many places of the maintenance of them. Ibid.

And a prescription in the cinque-ports to make tallage for such purpose, will be good. R. Ray. 448.

And an order for it will be good, though it does not show that they are in decay. R. Ray. 449.

[British ships in passing by the Edystone, and other light-houses in the channel, not touching at any place in Great Britain or Ireland, are not liable to pay the light-house duties to the Trinity-house. *Trinity-house v. Sorsbie*. B. R. T. 30. Geo. 3. 3 T. R. 768.]

### (I 1.) Navigation shall be free.

As to the freedom of trade, vide *Trade*, (A 1, &c.)

By the st. 13 Ed. 3. st. 2. c. 3. the sea shall be open to all.

[Stat.

[Stat. 26 G. 2. c. 6. directs the performance of quarantine, the manner, penalties, &c.]

(I 2.) But it shall be in English ships, &c.

But by the st. 5 R. 2. 3. and 6 R. 2. 8. none shall import, or export goods but in ships of the king's ligeance, (unless such ships able and sufficient are not to be had,) on pain of forfeiture of the goods. [The st. 5 R. 2. 3. is repealed by the st. 1 El. 13.]

By the st. 14 R. 2. 6. merchants of England shall freight only ships of the realm, so as the owners will take reasonable gains.

By the st. 4 H. 7. 10. and 23 H. 8. 7. [the st. 23 H. 8. 7. is expired] importing wines in any but English ships was prohibited; but the st. 4 H. 7. 10. is altered by the st. 5 & 6 Ed. 6. 18. and repealed by the st. 1 El. 13.

By the st. 5 El. 5. [expired] none shall import wine or woad from France, but in a vessel whereof a subject is owner, or part-owner.

So, by the st. 1 El. 13. revived by the st. 13 El. 15.

By the st. 12 Car. 2. 18. no goods shall be imported, or exported, into, or out of any lands, islands, &c. belonging, or which may belong, to the king, his heirs or successors, in Asia, Africa, or America, but in such ships as truly belong to the people of England, Ireland, Wales, or Berwick, or are of the built of and belonging to such lands, islands, plantations, &c. as the right owners, and whereof the master and three-fourths of the mariners are English, on pain of loss of all the goods and also the ship, &c. one third to the king, &c.

[In an information on this statute, it was determined that a ship which was manned by mariners resident for some years in Russia, but who were not natives of the country, was exempt from the penalties of the act. *Scot v. Schawrtz*, Scac. M. 11 Geo. 2. Com. 677.]

And by the same st. s. 3. 4. no goods of the growth or manufacture of Africa, Asia, or America, shall be imported into England, &c. but in such ships, &c. And no goods of foreign growth or manufacture, to be imported, &c. in such ships, shall be shipped from any places, but those of such growth or manufacture, or from such ports, &c. where they only can, or usually are, first shipped for transportation, on pain of the like forfeiture; one moiety, &c.

[If a ship be seized, as forfeited by this act, by a governor of a foreign country belonging to Great Britain, the owner cannot maintain trespass against him, although he has not proceeded to condemnation; for by the forfeiture the property is divested out of the owner. *Wilkins v. Despard*, B. R. H. 33 Geo. 3. 5 T. R. 112.]

Provided, not to extend, 1. To goods or commodities of the streights, or Levant seas, loaden in such shipping from the usual places of lading them in the streights, or Levant seas; nor, 2. To East India commodities loaden in such shipping in any of those seas southward and eastward of the Cape Bona Speranza, though not at the place of the growth; nor, 3. To any goods loaden in such vessels from Spain, Portugal, Azores, Madeira or Canary islands, of the growth or manufacture of any of those places; nor, 4. To bullion or goods taken by way of reprisals, by such ships having commission from the king.

So, by the st. 7 & 8 W. 3. 22. s. 2. no goods shall be imported to or exported from any colony or plantation that is or may be the king's  
in

in Asia, Africa, or America, or carried from one plantation to another, but by ships, &c. belonging to the people of, and being of the built of England, Ireland, or the plantations, whereof the master and three-fourths of the mariners be of the same people, except prizes, or by contract with commissioners, &c. for masts, &c. on pain of forfeiture *ut supra*.

[Colonial produce of the plantations cannot be transported from thence direct to any place in Europe. 3 Smith, 401. 7 East, 449.]

[The exportation of European manufactures from the Cape to any port to the eastward in his majesty's possession, is illegal. 4 Taunt. 136.]

[American property on board a neutral ship, not trading to any port or place of the American colonies, was not forfeited. 3 T. R. 477.]

But if a foreign ship be naturalized, importation in it will be lawful.

[By 20 G. 2. c. 45. all prize ships legally condemned, shall be considered as British-built ships.]

[By 34 G. 3. c. 68. no person shall be master of a British ship, or be deemed a British seaman, except natives, or persons naturalized or made denizens, or the subjects of some newly acquired country, or foreign seamen serving three years in the navy in time of war.]

So, if a foreign ship be naturalised, and afterwards sold to a foreigner, who resells it to an Englishman, it shall be used without taking the new oath required by the st. 12 Car. 2. 18. R. Hard. 511.

[But now by st. 26 G. 3. c. 60. no ship built out of his majesty's dominions, except prizes, shall be entitled to the privileges of a British ship.]

[And by s. 17. when and so often as the property in any ship or vessel belonging to any of his majesty's subjects, shall be transferred to any other or others of his majesty's subjects, in whole or in part, the certificate of the registry of such ship or vessel shall be truly and accurately recited, in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void, to all intents and purposes.]

[By 34 G. 3. c. 68., the indorsement of such certificates of registry is required to be in a certain form.]

[An absolute bill of sale of a ship at sea is void under this section, unless the certificate of the registry be recited in it. 3 T. R. 406.]

[Although the vendee give at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of this security; and though the vendee have also the grand bill of sale, and have taken possession of the ship immediately on her arrival, he cannot retain the ship as having a lien on her, against the assignees of the vendor, who became a bankrupt after this transfer of the ship. Ibid.]

[But a mere clerical mistake will not vitiate it. Rolleston v. Smith, B. R. H. 31 Geo. 3. 4 T. R. 161.]

[A. and B. being joint-owners of a ship, A. conveyed his moiety to B., but in the bill of sale the certificate of registry was not truly recited; B. took possession and afterwards mortgaged the whole ship to A. who did not take possession; then B. ordered C. to repair the ship, afterwards B. conveyed one half of the ship to A. and the other to D. It was holden, that the first bill of sale was an absolute nullity under this statute, and that A. was liable to C. for the repairs in an

action for work and labour brought by C., A. not having pleaded in abatement, that B. ought also to have been sued. *Westerdell v. Dale*, B. R. T. 37 Geo. 3. 7 T. R. 306. *Supra*, in *Merchant*, (E 9.)]

So, the importation of wine from Spain, or other country in Europe, need not be in an English vessel, or in which the master and three-fourths of the mariners are English. *Semb. Hard.* 487, 488.

[The husks and shells of cocoa-nuts, separated from the nut by fire, is not a manufacturing, but liable to the act of navigation. *Anon. H.* 1725, *Bunb.* 212.]

[Information of debt will lie for duties on French wines imported from Holland, though they might have been seized as forfeited. *Attorney-General v. Jewers*, M. 1726, *Bunb.* 225.]

[On an information for a ship forfeited for bringing over goods not of the growth, &c. notice in the master is not necessary. *Per totam Curiam*, *Idle v. Vanheck*, P. 1727, *Bunb.* 230. *Mitchel v. Torup*, H. 6 G. 3. *Parker*, 227.]

[But a distinction shall be made, whether the goods were part or not part of the cargo; and if passenger privately brings over a small parcel, it shall not be deemed part of the cargo, nor the ship forfeited. *Semb. Greeby v. Palmer*, H. 1733, *Bunb.* 232.]

[If a ship comes into port on pretence to refit, and the sailors run tens, it is a forfeiture of the ship, though she was seized and in the possession of the officers before the running. *Attorney-general v. Jackson*, T. 1727, *Bunb.* 236.]

[By 13 G. 2. c. 3. in time of war, three-fourths of the crews of privateers or merchant ships may be foreigners.]

[And any foreign seaman, who has served two years in time of war, on board a man of war, merchant ship, or privateer, is thereby naturalized.]

[By stat. 14 G. 2. c. 36. trade to and from Persia through Russia is permitted.]

By stat. 18 G. 2. c. 17. a reward of 20,000*l.* is given for the discovery of a passage by sea from Hudson's Bay to the Western and Southern Ocean of America.]

[Stat. 16 G. 3. c. 6. grants reward of 20,000*l.* for discovering a passage between the Atlantic and Pacific Oceans north of 52° latitude, and 5000*l.* to such as shall first approach within one degree of the North Pole.]

By stat. 13 G. 3. c. 26. no alien may purchase any share of a ship belonging only to natural-born subjects, without consent in writing of the owners of three-fourths in value.]

[Stat. 17 G. 3. c. 48. empowers commissioners to give rewards under 5000*l.* for probable proposals for discovering longitude.]

### (I 3.) Owner of a ship.

#### [(I 3. a.) Who shall be, &c.]

[The person on whose account the contract was really made, though he be not the legal owner of the vessel, is liable for necessities supplied to her. 7 T. R. 306. 1 H. Bl. 114. 8 East, 10. 11 East, 435. 13 East, 238. 16 East, 169.]

[It is a general rule, that the charter, not the chartered party, of a ship, is to be considered as the owner. But there are exceptions to that

that rule, namely, where, by the terms of the charter-party, coupled with the particular nature of the service in which the ship is employed, an intention to vest the temporary property in the chartered party can be inferred. One of the terms, in the present case, was as follows. The charter-party "granted" the ship, and "let to hire and freight," which are proper words of lease. The nature of the service was transport service. 4 M. & S. 288.]

[The charters granted to the Trinity-house impose duties for light-houses, buoyage, and beaconage, on the masters and owners of ships. A ship is chartered; and upon a question who was to be considered as the owner, whether charterer or chartered party, held, that though the former was in general to be so considered, yet, that the particular terms of the charter-party, coupled with a consideration of the particular nature of the service contracted for, shewed an intention to transfer the ownership to the chartered party. The terms, *inter alia*, were, that the ship was "granted and let to hire and freight;" the service was to transport troops. 4 M. & S. 288.]

[The registers of ships, are not evidence to fix the parties therein named as owners in actions against them, unless they are shown to have been made by their assent, or recognised by them. 14 East, 226. 4 Taunt. 802. 2 Taunt. 5. 4 Taunt. 652. *Secus*, the affidavits on which they were obtained. 4 Taunt. 802.]

[A party is not chargeable for necessities supplied to a ship, by proof of the execution of a bill of sale to him, without proof of his assent to the sale. 14 East, 226.]

[A party is not liable as a partner, for goods furnished to a ship, having disposed of his interest therein at the time, merely because the form of transfer was defective. 16 East, 169.]

[Though the master of a vessel be also lessee of it, by agreement with the owners for a term of years under covenants on their part, that he shall have the sole management of the ship, and employ her for his own sole benefit, &c. and on his part, that he shall repair her at his own sole cost, &c.; the owners are still liable for necessities furnished for the ship by order of the master, though without their knowledge, or without their being known to the person who supplied. Cowp. 636.]

[A tradesman who supplies a ship with necessities under contract with the master, has three securities for payment; 1. The owner; 2. The master; 3. And, lastly, a lien upon the vessel. 1 T. R. 109.]

[The owners are liable for the wages of seamen engaged by the captain. 1 T. R. 76.]

[The responsibility of a ship-owner indifferently carrying for hire, is the same as that of a common carrier. 1 T. R. 78.]

[Ship-owners are chargeable as for the not delivery of a cargo, which their captain or crew have pilfered. 8 T. R. 531.]

[The owner of a ship chartered as an armed vessel to the commissioners of the navy, is liable for an injury arising from the mismanagement of one placed on board by the commissioners. 2 N. R. 182.]

[The policy of st. 7 Geo. 2. c. 15., which limits the responsibility of ship-owners in case of embezzlement, &c. by master or mariners to the value of the ship and freight, is, to protect them from all treachery in those parties; and its words are sufficiently comprehensive for the end in view. Therefore, the case of a robbery by third persons, accom-

plished through intelligence given by a mariner who afterwards shared in the spoil, is within the act. 1 T. R. 18.]

(I 3. b.) The major part of the owners over-rules all.

If there are many owners; the ship shall be employed by consent of the majority. Sho. 13.

And the others, who do not consent, shall have their share of the profit. Ibid.

Or, by order in the admiralty, the owners who consent may give security, that they will satisfy him who does not consent for his share, if the ship perish, and will render his share, if the ship return; whereupon the owner who does not consent, shall have no part of the freight. 2 Ca. Ch. 36. (Vide Carth. 27.) [Vide Ambler, 255.]

Nor, shall be relieved for it in equity. R. 2 Ca. Ch. 36.

If there are many part-owners of a ship, and the major part agrees to the voyage, the assent of all shall be intended, who do not express a dissent. R. Skin. 230. Adm. Carth. 27.

If any dissent, an action upon the case lies against him for the damage in the loss of the voyage. Per Holt, Carth. 27. Comb. 110.

So, it was allowed, that upon security for the shares of the lesser part of the owners, given by recognizance in the admiralty, the voyage should proceed. R. Skin. 230.

But now it is adjudged, that the voyage cannot proceed, but a prohibition goes, if there be a suit in the admiralty upon such recognizance. R. Carth. 27.

[The voyage shall proceed on the recognizance being given in the admiralty. 1 Wils. 101.]

[If exorbitant fees be taken by a custom-house officer from the master of a vessel on his taking out a cocket and bond pursuant to st. 13 & 14 Car. 2. c. 11. s. 7. though the statute imposes the duty on the master personally, the owners may recover the excess in *assumpsit* for money had and received. Cowp. 805.]

(I 4.) Master : [power, interest, and duty.]

The master of a ship has the custody and trust of the ship and the goods in it. 3 Lev. 38. De Jure M. 209. Vide Merchant, (E 5. 6.)

And therefore, he shall answer for all goods, which are lost by his default: for he has a recompense for the carriage. De Jure M. 209. Vide Action upon the Case for Negligence, (C 1.)

And shall be charged for the duty, at any port, for weighage, &c. of the goods. R. 3 Lev. 38. R. 1 Sal. 249.

If the master contract and bind the ship to such a value by assent of the owner, he shall be bound by the contract of the master. 2 Ca. Ch. 238.

Otherwise, if the contract be without the allowance of the owner. Ibid.

Or, if the master makes a deviation, or barratry, whereby the goods are lost; though the owner allowed the master to make the contract, he shall not answer for the deviation. R. 2 Ca. Ch. 239.

So if the master buy victuals for the ship, and do not pay for them, the owners are responsible to the vendor; for the master is but their servant. 2 Ver. 643.

Though the owners give the master money for the victualling. Ibid.

If

[If master orders necessities (as sails, &c.) for the ship; both owner and master are liable, unless it appears that credit was given to the owners only, and then they only are liable. *Hoskins v. Slayton*, T. 10 & 11 G. 2. B. R. H. 376. 1 T. R. 108.]

[As where the goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. 1 T. R. 108.]

[The tradesman furnishing the goods has also a specific lien on the ship. *Ibid.*]

[A promise by the captain on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become an hostage, is binding on the owners, though they abandon the ship and cargo. 1 T. R. 73.]

[*Semble*, that the captain of a vessel on any emergency, has authority to do what is most for the interest of those concerned. 1 T. R. 611.]

[The owners of a ship cannot repudiate the master's contract, respecting the vessel; for example, — a ransom bill made in foreign parts, which, under the circumstances, seemed at the time to be most for their advantage, though, in the end, it turns out to be otherwise; as where the price of the contract exceeds the value of the ship and cargo. In such case, however, they may give up the property to contracting party, when they will not be liable to the charge; if they keep it, they keep it subject to the charge imposed upon it by the master. But all necessary engagements collateral to such contract, and without which it could not have been made; for example, an undertaking to remunerate a sailor if he would remain as a hostage under a ransom bill, given to an enemy for the restoration of the property captured, are binding upon the owners, though they abandon the property. The reason of the difference is, that the principal contract is made upon the security of the property, upon the implied condition that the money shall be paid, or the property be restored; the other contracts are not. 1 T. R. 73.]

[*Semble*, that the master in foreign parts, has no implied authority to sell the ship, though the expence of repairing will exceed the value. 10 East, 143.]

[The master may hypothecate the ship for the supply of necessities in foreign parts. 3 T. R. 267. *Dougl.* 103.]

[In cases of necessity abroad, as in order to procure bail where the vessel and cargo are libelled as prize, the master may hypothecate, but cannot stipulate for a sale as an indemnification. 2 Taunt. 344.]

[The master has no lien on the ship for a liability, or expence he has incurred for repairs during the voyage. 9 East, 426.]

[If a ship and cargo are sold as a security for advances, and the captain, on being made acquainted with the fact, writes to the vendees as his owners, who return him no answer, it seems, that he would be justified in afterwards paying the vendor the proceeds. The vendee by his silence and neglect to act as the owner, shows that he does not mean to take possession. 4 M. & S. 247. But where the sale is not by way of mortgage, but absolute, the rule may be different. *Ibid.*]

[*Semble*, that where a delivery is prevented, unless by the owner, the master is not justified in throwing the cargo overboard. 1 Taunt. 300.]



[The master of a vessel is only chargeable for necessaries supplied, where they have been furnished on his contract and credit; not, therefore, where, having been ordered by the owners before, they have been sent on board, after his appointment to the vessel. 1 T. R. 108.]

[The master of a vessel, who employs a shipwright to repair it, is, unless he otherwise stipulates, liable to him, as well as are his owners. 9 East, 426.]

[The bonds given by masters of vessels, under 26 Geo. 3. c. 40., are continuing bonds, and remain in force as long as the same person is master of the same ship; but not when he becomes master of any other vessel. It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel while in his charge, for the same bond covers all voyages made in her by him, and may be sued on for a breach of the conditions, during any one or more of them. 3 Price, 203.]

[The owner of a ship is not liable beyond the value of the ship and freight under 7 Geo. 2. c. 15. s. 1. in the case of a robbery in which one of the mariners is concerned by giving intelligence, and afterwards sharing the spoil. 1 T. R. 18.]

[The master of a ship has not a lien on the ship for stores and provisions furnished on his credit. Doug. 101.]

[The stat. 5 Geo. 2. c. 20. which inflicts a penalty of 20*l.* on persons piloting down the Thames, &c. only extends to vessels sailing on foreign voyages, and not to those which, having performed their voyages, are steered from one wharf to another on the river for the purpose of unloading their cargoes. *Rex v. Lamb*, M. 33 Geo. 3. 5 T. R. 76. *Rex v. Neale*, E. 39 Geo. 3. 8 T. R. 241.]

[By stat. 31 Geo. 3. c. 54. s. 7. for regulating the African slave-trade, it is necessary that the certificate of the captains having served as that act requires, should be attested by the owner or owners of the ship or ships in which the service was performed. *Farmer v. Legg*, B. R. E. 37 Geo. 3. 7 T. R. 186.]

### (I 5.) Mariners.

Mariners must be obedient to the master; for if one of them creates an open debate, he may be put out of the ship upon land, and shall lose his goods in the ship, and the half of his wages. *De Jure M.* 220.

If he use arms or weapons, the others may apprehend, imprison, and bring him to justice.

If he conspire to force the master to another port out of his voyage, it will be a capital crime.

They must be mutually aiding and assisting to one another upon the sea. *De Jure M.* 220.

They must remain in the ship till it be discharged, and the tackle taken down and ballasted anew.

Every one must work with his companion during the lading and discharge of the ship.

And shall not only deliver goods out of his ship, but must carry them for a reasonable hire to the place upon land where they ought to be put, if there are no other carriers or porters for it.

By the custom of merchants, mariners are entitled to wages at every delivering port. 2 Ver. 728.

Though

Though an agreement be made with them, that they shall not demand wages till a return to the port of London. 2 Ver. 728.

When the freight was also to be paid; and provision was made before the voyage begun, that, every six months, wages should be paid for one month, during the voyage. Ibid.

But a mariner shall lose his wages from the last port, if the ship or goods are lost. 1 Sid. 179. [Dougl. 539.]

[Wages in general are due upon the ship's arrival at the first port of destination or delivery. And in a voyage from England to Newfoundland, and thence with fish to Spain, Newfoundland is not a port of delivery; and if the ship is taken between Newfoundland and Spain, the mariner loses his wages. *Hernaman v. Bawden*, H. 6 Geo. 3. 3 B. M. 1844.]

So, he shall lose his wages, if he rebels, and does not repent in due time, and tender amends. De Jure M. 220.

If he refuses aid and assistance to his companion upon the sea. Ibid.

If he does not help to save the goods when the ship perishes.

If he absents himself when the ship is ready to sail.

[Under a clause in the ship's articles, that the seamen may leave at the end of three months, if the ship is in port, or in perfect safety, of which the captain is to be the sole judge; if the ship is in port at the end of three months, they may leave without his permission. 2 N. R. 408.]

[A contract by foreign seamen, that they will not sue the master in foreign courts, is not limited to the duration of the voyage. 2 H. B. 603.]

[No wages are due to a sailor unless freight is earned. Dougl. 539.]

[Held that a mate in a slave-ship, could not, on the ground of a verbal promise, claim the perquisite of the price of a negro-slave beyond the wages due to him by certain written articles of agreement executed between the master, officers, and crew. 2 B. & P. 116.]

[The licence under 37 Geo. 3. c. 93. s. 3., empowering the captain to give more than double monthly wages for seamen, must specify the sum. 2 B. & P. 57.]

[A seaman disabled in the course of his duty, pending the voyage, is entitled to wages for the whole voyage. 2 H. B. 606.]

[Where it is stipulated that seamen "shall not demand, or be entitled to their wages, or any part thereof," until arrival of the ship in her port of discharge; they cannot on a loss before arrival, claim wages *pro rata*, on the ground that freight had been earned at an intermediate port. 8 East, 300.]

[If the ship be lost or captured before the end of the voyage, the wages are lost. And query, whether by a ransom, the right to wages for the period antecedent to the capture is revived? 1 T. R. 79. 3 Burr. 1844.]

[In the case of a hostile detention by a foreign state, if the ship ultimately performs her voyage, the sailor, though a foreigner, is entitled to wages during his detention, though he be forcibly taken from the ship by the orders of a foreign prince. 4 East, 546. 1 Smith, 144. 4 East, 566. 1 Smith, 153. Reversing the judgment in 3 B. & P. 405.]

[One seaman serving under articles pursuant to 37 Geo. 3. c. 73., does not lose his whole wages, nor, *semble*, even a proportionable part, by another embezzling the cargo. 1 N. R. 347.]

[To entitle the master to deduct a month's wages under 2 Geo. 2.

c. 36. s. 6., he must prove that the seaman quitted the ship without leave in writing. 3 B. & P. 302.]

[Before the master can insist upon the forfeiture of a month's wages for leaving the ship without leave in writing, he must have debited himself to Greenwich Hospital in the amount, pursuant to st. 2 G. 2. c. 36. s. 9. 3 B. & P. 302.]

[An officer or sailor who has agreed to serve on board a letter of marque for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she complete her voyage, although he shall have been sent from the ship before the capture as prize-master on board a prize taken by her in the course of the voyage. Dougl. 539.]

[The whole of a seaman's wages are not forfeited under 2 G. 2. c. 36. s. 3., by his leaving the ship after her arrival, but before she is moored. 3 B. & P. 302.]

[The representatives of a deceased seaman, may sue the captain for the excess of wages due beyond the sum paid over by him to Greenwich Hospital, pursuant to st. 37 Geo. 3. c. 73. 1 N. R. 299.]

[In an action for seaman's wages, it is not incumbent on the plaintiff to prove that the ship earned the freight. 7 Taunt. 319.]

[There are several statutes, namely, 31 G. 2. c. 10. 26 G. 3. c. 63. 32 G. 3. c. 33., and 32 G. 3. c. 67., which regulate the modes by which seamen and marines may convey their prize-money or wages in the hands of the public officer. And every instrument of conveyance for this purpose must be conformable to the regulations of these statutes, *Turtle v. Hartwell*, B. R. M. 36 G. 3. 6 T. R. 426.]

[C., by virtue of an order from B. to receive all money due to him for prize-money, obtains three out of four instalments due from A. to B. on that account: these payments are afterwards questioned by B., who brings his action against A. for the whole sum, and at the same time C. demands the fourth instalment: an application to the Court by A. to stay proceedings in the action against him by B., on his paying the fourth instalment to such person as they should appoint, was refused. *Macdonald v. Pasley*, C. P. M. 38 G. 3. 1 Bos. & Pull. 161.]

[*Seemle*, That nothing but a power of attorney, or a will complying with the provisions of the above acts, will warrant the payment to third persons of money due from the public to sailors and marines. *Ibid.*]

### [ (I 6.) Supercargo. ]

[A supercargo, unless his authority be expressly or impliedly restrained, is invested with complete controul over the cargo, and every thing which immediately concerns it, even whilst the vessel is in England. 12 East, 381.]

[Where the destination of a chartered vessel is to be as directed by the freighter or his agents, a supercargo on board has the same authority in this respect as his principal, even whilst the vessel is in England. 12 East, 381.]

### [ (K) Navy. ]

[The appointment of officers, and the particular number, to ships, is wholly in the discretion of the admiralty, from the extensive powers vested in them by their commissions and is therefore independent of,

of, and uncontrollable by, the orders of the crown; which, when given, are merely directory, and do not avoid a commission or appointment made in opposition to them. 2 East, 507.]

[A flag-officer has no right to share in the gratuity given to a captain, under his orders for carrying treasure; nor, *comme semble*, in the freight received by the captain for carrying that of individuals. 3 Taunt. 442.]

[The commander of a king's ship may lawfully carry bullion. 4 Taunt. 787.]

[The commander of a ship of war cannot, unless authorised, lawfully carry private bullion on freight. 5 Taunt. 143.]

[*Semble*, that no action lies by a subordinate officer against his superior officer, for an act done, however maliciously, and without even probable cause, in the course of discipline and under powers incident to his situation, upon the same principles of public policy and convenience which protect judges, &c. from private suits. 1 T. R. 493.]

[No action lies for delaying to bring an officer, under arrest, to a court martial. 1 T. R. 548. 704.]

[A subordinate officer must not judge of the propriety of the order he receives; he must obey it, unless obedience be physically impossible, when his obedience is justifiable. 1 T. R. 784.]

[The relation of master and servant does not subsist between the captain of a ship of war and his officers or seamen; therefore he is not answerable for their negligence. 15 East, 384.]

[Where a crew are supplied with necessaries, at the instance of one of its officers, to a considerable amount, and an intention on his part to be personally liable does not clearly appear, the presumptions are in his favour. 1 B. & P. 158.]

[The captain of a ship in the king's service, receives at Gibraltar bullion to be brought to this country for freight, giving a bill a lading for it. The ship arrives, but the bullion is lost. Held, that whether it was illegal or not under 22 G. 2. c. 33. s. 24., for the captain to receive the bullion on board, at all events he was answerable for the loss of it. 2 Mars. 293. 6 Taunt. 577.]

[By "officers," in the stat. 44 G. 3. c. 13. s. 14., are meant, officers to whom execution of the process has been delegated by the court, whence it emanated. 11 East, 25.]

[It seems, that ship-agents will not be discharged in making any of the payments mentioned in stat. 26 Geo. 3. c. 63. s. 1., under any other authority than a power of attorney in the form prescribed therein. 1 B. & P. 161.]

[A lieutenant in the navy is empowered to draw for his pay every three months. The agent who makes up his accounts, is entitled to 6*l.* in the pound only upon the balance actually received and paid by him, the agent; and if, through mistake of the law, he deducts in such cases upon the whole sum paid by government, he incurs the penalty of 31 G. 2. c. 10. s. 30. 2 Smith, 607. 6 East, 541.]

[Stat. 31 G. 2. c. 10. s. 30. applies to a lieutenant. 2 Smith, 607. 6 East, 541.]

[It is in the discretion of the court to adjudge either corporal punishment, or the 200*l.* penalty, against one convicted of having concealed naval stores, or of having them in his custody. 5 T. R. 370. And the penalty may be mitigated. Lofft. 27.]

[The

[The power of sentencing to hard labour one convicted on stat. 9 & 10 Wil. 3. c. 41. s. 2., for having unlawfully in his possession or concealing naval stores, is taken away by stat. 39 & 40 G. 3. c. 89. s. 2. 8 East, 53.]

[Costs may be adjudged against one convicted of having concealed naval stores, or of having them in his custody. 5 T. R. 371.]

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### NE ADMITTAS.

Vide PLEADER, (3 I 3.) — QUARE INCUMBRAVIT, (A).

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### NECESSITY.

Vide CHANCERY, (4 O 4.) — PLEADER, (3 M 20. 30.)

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### NE EXEAT REGNO.

Vide CHANCERY, (4 B). — PRÆROGATIVE, (D 3, 4.)

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### NEGATIVE AND AFFIRMATIVE.

Vide PLEADER. (R 3.)

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### NEGATIVE REGNANT.

Vide MANDAMUS, (D 5.) — PLEADER, (R 5, 6.)

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### NEGLIGENCE.

Vide ACTION UPON THE CASE for NEGLIGENCE. — PLEADER, (2 P 1, &c. — 2 O — 2 R) — RETURN, (D 2.) — VISCOUNT, (D 1.)

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### NE INJUSTE VEXES.

Vide DROIT, (I).

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### NE UNQUES ACCOUPLE.

Vide PLEADER, (2 Y 10.)

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### NE UNQUES EXECUTOR.

Vide PLEADER, (2 D 7.)

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### NE UNQUES SEISIE.

Vide PLEADER, (2 Y 7.)

**NEWGATE.**

Vide IMPRISONMENT, (E).

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**NEW TRIAL.**

Vide PLEADER, (R 17.)

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**NIGHT.**

Vide TEMPS, (E — F).

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**NIL DEBET.**

Vide PLEADER, (2 V 6. — 2 W 13. 17. 43. 47.)

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**NIL DETINET.**

Vide PLEADER, (2 W 44. — 2 X 3.)

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**NIL DICIT.**

Vide PLEADER, (E 42.)

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**NIL HABET IN TENEMENTIS.**

Vide PLEADER, (2 W 48.)

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**NOBILITY.**

As to names of dignity, and how created, vide Dignity, (A — B 1. &c. — C 1, &c.) — Prærogative, (D 31.)

How the trial shall be, whether one be noble. Vide Dignity, (D).

How a dignity will be forfeited. Vide Dignity (E).

Privileges of the nobility, as to trials by peers, &c. Vide Dignity, (F 1, &c.) — Parliament, (L 16, &c.)

As to the right, style, coronation, and dignity of the king. Vide Roy.

As to his prærogatives. Vide Prærogative.

As to the queen and the king's children. Vide Roy, (F 1, &c. — G).

As to the privy council, and other council of the king, and guardian of the kingdom. Vide Roy, (E 2. — H 1, 2.)

**(A) Precedence.**

By the st. 31 H. 8. 10. none but the king's children shall have place on either side the throne in parliament, whether the king be present or absent.

By the common law, the king may give such precedence to his counsellors and subjects as he pleases. 4 Inst. 361.

And therefore, by the king's grant, a duke may be placed by his patent next to such, and before such a duke. Ibid.

Or, shall he precomes, and shall have precedence before all earls. R. 4 Inst. 361.

By

By the st. 31. H. 8. 10. the king's vicegerent in ecclesiastical causes shall sit on the right-hand of the parliament-house on the same form with, but above the archbishop, then the archbishop of Canterbury, York, London, Durham, Winchester, then the other bishops according to antienty, on the same side and form.

The archbishop of Canterbury precedes, then the archbishop of York, then the bishop of London, the bishop of Durham, the bishop of Winchester, and afterwards every bishop of the one province or the other, according to his antienty. 4 Inst. 361.

The two archbishops have precedence of all other nobility in parliament, council, and commissions, except where the lord chancellor presides. Ibid.

A bishop has precedence of all other barons, not of dukes, marquises, earls, or viscounts. Ibid.

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### NONAGE.

Vide ENFANT.

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### NON ASSUMPSIT.

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (H 5.) — PLEADER, (2 D 8.—2 G 1.)

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### NON ASSUMPSIT INFRA SEX ANNOS.

Vide ACTION UPON THE CASE UPON ASSUMPSIT, (H 6, 7.)

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### NON CLAIM.

Vide CLAIM, (B 1, 2, 3.) — FINE, (K 1, 2.)

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### NON COMPOS MENTIS.

Vide CAPACITY, (D 5.) — CHANCERY (3 Q.) — DEVISE, (H 1.) — DISCENT, (D 9.) — IDIOT, (D 1, &c.) — TESTMOIGNE, (A 1.)

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### NON-CONFORMIST.

Vide JUSTICES OF PEACE, (B 20.)

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### NON DEMISIT.

Vide PLEADER, (2 W 48.)

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### NON EST FACTUM.

Vide PLEADER, (2 D 8.—2 V 7.—2 W 18.)

**NON INFREGIT CONVENTIONEM.**

Vide PLEADER, (2 V 5.)

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**NON-OBSTANTE.**

Vide PARDON, (G—H.)

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**NON-OMITTAS.**

Vide RETORN, (B |2, 3.)

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**NON-RESIDENCE.**

Vide ESGLISE, (N 4,) — PLEADER, (2 S 23.)

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**NONSUIT.**

Vide APPEAL, (G 14.) — EVIDENCE, (A 5.) — PLEADER, (X 1, &c.)

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**NON SUM INFORMATUS.**

Vide PLEADER, (E 42. — Y 1.)

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**NON-SUMMONS.**

Vide ABATEMENT, (H 53. — I 26.)

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**NON-TENURE.**

Vide ABATEMENT, (F 14.)

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**NON-USER.**

Vide LIBERTIES, (C 1, 2.)

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**NORROY.**

- (A) The antiquity and diversity of heralds. *infra.*
- (B) The office. p. 174.
- (C) The antiquity of arms. p. 174.
- (D) The right to them. p. 174.

**(A) The antiquity and diversity of heralds.**

There are three kings of arms, who have several heralds under them: *Garter, Clarenceux, and Norroy.* Vide Courts, (E 3.)

*Herald,*



*Herald, est vox incertæ radice, sed verisimilior derivatio est à Saxon. hepe, exercitus, et alb, famulus sive minister, quasi minister exercitus vel armorum. Spel. Gloss. Herald.*

*Temp. H. 3. fuerunt in Anglia reges heraldorum, heraldi, et persuivandi. Spel. Ibid.*

*Reges toti Angliæ duo tantum ab antiquo, unus Australium partium cis Trentam, alter Borealiū trans Trentam. Spel. Herald. Hic Norroy, ille Clarencieux nominatus. Spel. Ibid.*

*Garter nullā donatus provinciā in primum locum ab H. 5<sup>o</sup> fuit super-inductus. Spel. v. Herald.*

*R. 3. 1<sup>o</sup> regni primus heraldos incorporavit. Spel. v. Herald. 4. Inst. 126.*

*Ph. & M. anno regni 3<sup>o</sup> granted to them a new charter, whereby garter rex armorum, clarencieux rex armorum partium Australium, norroy rex armorum partium Borealiū, vi heraldi inferiores, Windsor, York, Chester, Richmond, Somerset, Lancaster, et omnes prosecutores sive persuivandi armorum sunt incorporati. Spel. v. Herald.*

### (B) The office.

*Munus heraldorum domi est, quicquid ad nobilitatem spectat; et rem honorariam: foris sunt legati, belli, pacis fœderisque nuncii. Spel. v. Herald. 4 Inst. 126.*

*In coronationibus, nuptiis, exequiis, principum congressibus, pompas ducunt. Spel. v. Herald.*

*Curant illustria spectacula, hastiludia, duella, curant nobilium insignia et genealogias. Spel. v. Herald.*

### (C) The antiquity of arms.

The antiquity of arms and armories is very antient, which, by the advice of Aristotle, seem to have been given to martial men for reward of their service by Alexander the Great, to scholars by the emperor Charles the Fourth.

The usage to distinguish families seems to have been introduced after the voyage for recovery of the Holy Land, temp. R. 1. After which, the descendants of the chiefs in that voyage used the same coat that was there used by their ancestors, and so those became hereditary. 1 Sid. 354.

### (D) The right to them.

A man now has an inheritance and fee-simple in his arms, armories, and shield. Co. L. 27. a.

Which descend, in the nature of gavelkind, to all the male issue, except that the eldest bears them without addition, the others shall give an addition; for *additio probat minoritatem*. Co. L. 27. a. 140. b.

And therefore, every son is as great a gentleman as the eldest. Lit. s. 210.

So, the king may grant arms to a man and his heirs male, without saying, of his body, and he shall have a fee. Co. L. 27. a.

But the issue female, if there be a son, shall not take the arms of the father by descent.

Yet

Yet a daughter may bear her father's arms, in a lozenge, or under a mantle, to shew her family. Co. L. 27. a.

So, her husband may impale, or quarter them, as the case requires. Co. L. 27. a.

So, a man with the king's licence, may grant his arms to another. 4 Inst. 126.

So, he may grant his surname with his arms. 4 Inst. 126.

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## NOT GUILTY.

Vide APPEAL, (G 7.) — PLEADER, (2 L 2. — 3 M 11.)

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## NOTARY PUBLIC.

Vide MERCHANT, (F 8, &c.)

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## NOTE.

The note and foot of a fine. Vide FINE, (E 16.)

Promissory-note. Vide MERCHANT, (F 15, &c.)

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## NOTICE.

### (A) Notice.

When notice is necessary, or not, vide Bye-Law, (B 5.) — Condition, (G 9. — L 8, &c.) — Dismes, (E 21. — I 2.) — Esglise, (N 11.) — Pleader, (C 73, &c. — 2 S 7.)

What shall be notice in equity, and of what regard it shall be, vide Chancery, (4 C 1, &c. — 4 I 3, &c. 11.)

How notice shall be given, and to whom, vide Pleader, (C 73, &c.)

If an obligation be to pay 300*l.* at his age of twenty-one, or within twenty days after marriage upon notice, which of them first happens, notice ought to be given of the age, as well as of the marriage. R. Latch, 158. Vide Pleader, (2 Z 1.)

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## NOVEL DISSEISIN.

Vide ASSISE, (B 1, &c.)

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## NULLIUS IN BONIS.

Vide BIENS, (F.)

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## NULLUM TEMPUS OCCURRIT REGI.

Vide PRÆROGATIVE, (D 86.)

**NUL TIEL PERSON.**

Vide ABATEMENT, (E 16.)

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**NUL TIEL RECORD.**

Vide BAIL, (R 8.) — CERTIORARI, (A 1.) — PLEADER, (2 W 13. 38.)

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**NUL TIEL VILL, &c.**

Vide ABATEMENT, (H 18, &c.)

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**NUNCUPATIVE WILL.**

Vide DEVISE, (C).

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**NUPER OBIT.**

Vide ASSISE, (E).

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**NURTURE.**

Vide GUARDIAN, (D).

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**NUSANCE.**

Vide ACTION UPON THE CASE for a NUSANCE. — CHASE (K). — JUSTICES OF PEACE, (B 24, &c.) — LEET, (L 12, 13.) — PLEADER (2 N.) — PRESCRIPTION, (F 2.) — PROHIBITION (A 3.)

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**OATH.**

Vide ABJURATION. — ALLEGIANCE, (B 1. &c.) — DIGNITY, (F 3.) — ENQUEST (D). — JUSTICES, (S 11.) — (JUSTICES OF PEACE, (B 23, 24.) — LEET, (M 8.) — OFFICER, (K 7.) — PLEADER, (2 S 6.) — SEREMENT.

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**\*OBLIGATIONS.**

Vide DISMES, (B 1.) — PROHIBITION, (G 11.)

OBLI-

## OBLIGATION.

(A) Obligation, what shall be. infra.

(B 1.) By what words it may be. p. 178.

(B 2.) Though they are uncertain. p. 178.

(B 3.) Though false Latin. p. 179.

(B 4.) Though there be a small variance. p. 180.

(B 5.) But not insensible words. p. 180.

(C) Single bill. p. 180.

(D) Bill obligatory. p. 181.

(E) Condition. p. 181.

(F) When an obligation shall be joint. p. 183.

(G) When joint, or several. p. 184.

(H) When several only. p. 184.

(I) Who are bound by an obligation. p. 184.

(I 1.) An executor or administrator. p. 184.

(I 2.) A survivor. p. 184.

(K) Recognizance. p. 185.

## (A) Obligation, what shall be.

An obligation is a deed, whereby a man binds himself under a penalty to do a thing.

If he be bound without a penalty it shall be called a single bill. Vide for this, post, (C).

If it be acknowledged before a mayor of the staple, chief justice, &c. it shall be called a statute, or recognizance. Vide post, (K) — Statute Staple.

In every obligation there must be an obligor, and obligee, and a sum in which he is bound. Peark. Fait, 119. Yel. 194.

An obligation, as another deed, must be sealed and delivered. Vide for this, Fait, (A 1, 2, 3.)

Must be written on paper, or parchment. Vide Fait, (A 1.)

But it need not to be read to the obligor, or subscribed by him. Vide Fait, (B 1, 2.)

There is no need of date, or witness, or mention of the sealing, &c. Dy. 19. a. R. Dal. 1. Vide Fait, (A 2. — B 3, 4.)

What shall be a sufficient delivery, or not. Vide Fait, (A 3, 4.)

What shall be part of an obligation. Vide Fait, (E 2.)

By whom or to whom an obligation may be made. Vide Capacity.

By what name an obligor ought to be described. Vide Fait, (B 1. — E 3.)

[Bond to a woman for cohabitation had with her is good. 2 Wils. 339.]

[A., B., C., D., and E., indicted for perjury by F., agree that G. should  
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should give him a note for 350*l.* not to appear at the trials, and that A., B., and H. should give a bond to indemnify G. against the note, the bond is given for an illegal consideration. *Collins v. Blantern*, P. 7 G. 3. 2 Wils. 341. 347.]

[A bond given for an illegal consideration is void at common law *ab initio*. *Ibid.*]

### (B 1.) By what words it may be.

An obligation does not require any prescribed form of words: and therefore, if a man by his deed say, I shall pay you 20*l.* that will be a good obligation. 2 Rol. 146. l. 37. Per Brian, 22 Ed. 4. 22. a.

Or, *concedo vobis solvere*. 2 Rol. 146. l. 40. Per Catesby, 22 Ed. 4. 22.

[I am held and firmly bound in 20*l.* to be paid to the same Richard Lambert, is good; though there be no person mentioned before, to whom he is bound or to whom *videm* can refer. 2 Str. 945.]

Or, Memorandum that I have received of B. 20*l.*, which sum I promise to pay to the same B., &c. 2 Rol. 146. l. 35. R. 22 Ed. 4. 22. a. Dy. 22 b. R. Cro. El. 729. Mo. 667. Ow. 127. Yel. 23.

So, I have agreed to pay, though it be in the *præter tense*. R. 1 Leo. 25.

So, I am content to pay 10*l.* at M., and 10*l.* at Lady-day. R. 3 Leo. 119.

I acknowledge to B. by me 20*l.* on demand. R. 1 Vent. 38. Dy. 22. b.

So, every deed, by which a man acknowledges himself to be indebted to another. Dy. 21. a.

Or, to have his money in his hands. *Ibid.*

So, if a deed say, I am bound to A. in 100*l.* for which payment I authorise him to levy the money on the farm of B. It will be a good obligation, upon which debt lies, though he has power to levy it otherwise. R. 3 Leo. 223.

If it says, I acknowledge to owe to A., for which payment I bind, &c. to B. It is a good obligation to A., and the last words are void. Cro. El. 886.

So, I appoint A. to take 100*l.* out of the first money he receives of mine, and makes A. his receiver; for every deed which acknowledges a debt to another, will be an obligation. Dub. 3 Mod. 154.

So, I bind myself to pay all my brother owes him, with an averment that he owed him 40*l.* R. Cro. El. 561.

Or, I bind myself to save A. harmless, &c. in 200*l.* *solvend. cum requisit.* Cro. El. 613.

So, if an obligation, or words that make a bill obligatory, be wrote in a book and there sealed, it will be an obligation. R. Cro. El. 613.

### (B 2.) What words are sufficient:—Though they are uncertain.

So, if, by a bill obligatory, A. acknowledges himself to owe 10*l.* to B., to be paid such a day, and by the same bill binds himself in 20*l.* and does not say to whom he is bound, it will be good; for it shall be intended to him to whom he was indebted. R. 2 Rol. 148. l. 10.

So,

So, if it be upon condition, to stand to the award of B. and C., and if they do not agree, to the umpirage of D., without saying, to what, do not agree; for it shall be intended, to make an award. R. Cro. Car. 226.

So, if it be upon condition to pay 50*l.*, without saying, of money, yet it is sufficient; for it shall be intended. R. 1 Sid. 151.

So, if an obligation be, *teneri A. in 20*l.* solvend. dicto attorn. et assign. suis*, omitting A. to whom he is bound. R. Sal. 659.

(B 3.) Though false Latin.

So, an obligation will be good, though barbarous or false Latin be used: as, if a man be bound in *septuagint libris*, it shall be intended 700*l.* though it be barbarous Latin. R. 2 Rol. 147. l. 2. Mo. 645. Vide Abatement, (H 2.)

So, if he be bound in *quinquegent. or quemquegent. libris*, for *quingent.* R. cont. but afterwards in error acc. 2 Rol. 146. l. 50. Hob. 119. 2 Cro. 146.

In *triginti libris*, for, *triginta.* R. 2. Rol. 146. l. 45.

In *sexigint. libris*, for, *sexagint.* R. 2 Rol. 147. l. 10. Hob. 20. 2 Cro. 338.

Or, *sessanta*, for, *sexaginta.* R. 2 Rol. 147. l. 20. Hob. 19. 2 Cro. 208.

In *septuagent. et quinquagent. libris*, for 750*l.* R. 2 Rol. 147. l. 5. Hob. 116. 10 Co. 133. a. Cro. El. 896.

In *sexingent.*, for, *sexcent libris.* R. 2 Rol. 147. l. 15. 2 Cro. 338.

In *trigintata*, for, *triginta libris*; for the syllable *ta* is surplusage. R. 2 Rol. 147. l. 20. Hob. 18. R. cont. Yel. 225. R. 2 Cro. 309. 355.

In *wiginti libris*, for, *viginti.* 10 Co. 133. a.

So, if a man be bound by an English bill in *sewteen*, for seventeen pounds. 10 Co. 133. 2 Rol. 147. l. 42.

Or, *threty ponds*, for thirty pounds. R. 2 Cro. 607.

Or, in *sex triginta*, for, *triginta et sexlibris.* R. Sal. 462. R. Skin. 310.

In *quinginta et duabus libris*, for, *quinquaginta et duabus.* R. Jon. 366. Vide infra.

So, if an obligation be, *noverint, &c. me A. tenerie et obligarie B. in 10*l.* ad quam, &c. obligamus me, &c.* it will be good: for the parties and sum are well, and any words, whereby it may be collected that he binds himself, are sufficient. R. Yel. 193. 2 Cro. 261.

So, if there be a blank for the christian name of the obligor, if his name be subscribed. R. 2 Cro. 261.

So, if the name be *Joaem*, without a dash, for it shall be intended *Johannem* abbreviated. R. Cro. Car. 417, 418.

So, if the bill be, *cognovit se debere et indebitat. fore sumam 20*l.* solvere B., &c.* it will be good. R. 2 Vent. 106.

So, where the words are not Latin, if the sense or intention may be collected by the condition, or other words of the obligation, it is good: as if a man be bound in 20 *nobilis*, for, 20 *nobles*; for there is no proper Latin word for *noble*. 2 Rol. 146. l. 42. 2 Cro. 203.

If he be bound in *octigenta libris*, with a condition for payment of 40*l.*, it will be good; for it shall be intended for 80*l.* R. 2 Rol. 147. l. 30. 10 Co. 133. Osborn was *octaginta*, and good. Vide Hob. 19. cont. but the condition not there mentioned. Vide post, (B 5.)

Or, *octogesimo*, for *octoginta libris*. R. 2 Rol. 147. l. 27. Hob. 75. Mo. 864.

So, if he be bound in *septuaginta libris*, with a condition for payment of 350*l.*, for it shall be intended 700*l.* R. 2 Rol. 147. l. 37. 10 Co. 133.

In *quingint. duabus libris*, with a condition for payment of 26*l.*, for it shall be intended an abbreviation of *quinguaginta*. R. 2 Rol. 147. l. 45. Cro. Car. 416. 418.

In *quingecessimis libris*, for, *quinguaginta*. R. 2 Cro. 290.

In *quadrans libris*, with a condition to pay 20*l.*, shall be intended *quadragint.* R. Sal. 462.

So, if it be quadrant, in a bail-bond for appearance; for the statute directs 40*l.* Semb. 2 Mod. Ca. 342.

#### (B 4.) Though there be a small variance.

So, a small variance between the obligation upon *oyer* and the declaration does not avoid it: as, if the declaration be upon a bill, that he will pay, &c. And the bill says, if he pay, &c. R. 3 Lev. 66.

If the obligation in the declaration be 30 *D. anno D.* 1701, and the obligation itself upon *oyer* be 30 *D.* 1701. R. Sal. 658.

Or, in such a year of the king, and the obligation omits *anno regni*. Sal. 658.

#### (B 5.) But not insensible words.

But where words are insensible, and the intent of the parties cannot be known, the obligation will be void:

As, if a man be bound in 20 *liveries*, it is void; for it does not appear whether it was intended *libris*. R. 2 Rol. 146. l. 47.

Or, 20 *litris*, or *lib'is*. R. Noy, 109.

Or, in *sexgint. libris*; for there is no such word, and it does not appear what was intended. R. 2 Rol. 147. l. 12. 2 Cro. 190.

Or, *octigenta libris*. 2 Rol. 147. l. 30. Hob. 19. Vide ante, (B 3.)

So, if a man be bound to the sheriff in *quadragent. libris*, with a condition for appearance; for *gent.* imports *centum*, and therefore it cannot be taken for 40*l.*, and the condition being collateral, does not shew the intent. R. 2 Rol. 147. l. 55.

If he be bound in *libris*, without saying, how many. R. Yel. 225.

Or, in *viginti literis*. 2 Cro. 203. 603.

So, if it be *terengentate libris*. R. 2 Cro. 603.

In *quantoginta libris*. R. 2 Lev. 166.

So, if an obligation be to two in 200*l. solvend.* 100*l.* to one, and the other 100*l.* to the other, it will be repugnant and void. Qu. Dy. 350. a. Acc. per Hob. 172. Dy. 350. a. in marg.; for the last words shall be rejected, and the obligation stand joint for 200*l.*

#### (C) Single bill.

A single bill is, when a man is bound to another by bill, or note, without a penalty.

Upon such a single bill, of a distant time, interest may be recovered in damages. Per Holt, Mod. Ca. 167.

Though

Though payable upon demand, and no demand proved, where the defendant pleads *non est factum*. Ibid.

Vide post, (F).

### (D) Bill obligatory.

A bill obligatory is, when he is bound in a penalty, without a condition; as, if A. acknowledges himself indebted 20*l.*, and for payment binds himself in 40*l.* Cro. Car. 515. 2 Vent. 106. Vide Merchant, (F 2.)

So, if he acknowledges himself *debere* 20 *quarteria frumenti*, &c. and if he do not pay it at the day, that he shall lose 40*l.* Dy. 24. b.

In an action upon such a bill, the plaintiff cannot declare for the penalty, without an averment that the single sum was not paid at the day limited for it by the bill. R. Cro. Car. 515.

So, if the bill be for 14*l. solvend. una cum* 6*l.* upon account, he must declare only for the 14*l.*; for that which comes after the *solvend.* is no part of the bill. R. Cro. El. 537.

### (E) Condition.

A condition is in the nature of a defeazance, subscribed or indorsed, upon the obligation. Vide Defeazance. — Fait, (E 2.) Vide title Condition, (A 5. — D 1, 7, 8.)

[However capricious the terms in the condition of a bond may be, on performance of which the right of the obligee is to arise; it does not arise until performance. 6 T. R. 200. S. C. 2 H. B. 163.]

The words of a condition ought to have a reasonable construction; and therefore, if it recites that 500*l.* was a portion for A., and if the defendant pay interest yearly, viz. at Christmas and Midsummer next, and the principal when a settlement is made; he ought to pay interest for the whole time, after Midsummer next, till the principal is paid. R. Ray. 420.

[The recitals in the condition of a bond are a key to its construction, and will serve to restrain the generality of the condition, where such generality is inconsistent with the intention expressed in the condition. 2 M. and S. 363.]

[Where no day of payment is specified in the condition of a money bond, it is payable on the day of the date; and, therefore, may be referred to the Master, under st. 4 Ann. c 16. s. 13. 7 T. R. 124.]

[The condition of a bond being to render a fair, just, and perfect account in writing, of all sums received; if the obligor neglects to pay over such sums, the condition is broken. Dougl. 382.]

[The purpose and intention with which a bond was given may be pleaded, if consistent with the bond and condition, though not expressed therein. 5 T. R. 381.]

[Matter *de hors* a bond, shewing that it was given for an illegal consideration may be pleaded. 2 Wils. 341. 3 T. R. 424., though inconsistent with its terms. 9 East, 408. Id. 416.]

[Debt on bond conditioned for payment at a certain day. Plea that it was given as an indemnity to the plaintiff against another bond, and *non damnificatus*. Held bad. Cowp. 47.]



[Where a bond is conditioned for the performance of covenants, "comprized in a certain indenture made, or expressed to be made, between," &c. the obligor is estopped to say that there is no indenture. 2 B. & P. 299.]

[If the condition of a bond be an impossible condition, the bond is single; secus, if it be only improbable. 6 T. R. 200. S. C. 2 H. B. 163.]

[A bond conditioned for the performance of acts, some of which are contrary to common law; for instance, being simoniacal, is only void *quoad* those acts. *Aliter*, had part of the condition been contrary to the statute law. "For the common law doth devide according to reason, and having made that void that is against law, lets the rest stand." But the statute is a strict law. 4 M. & S. 66.]

If the condition be, to pay 2s. per week till 7l. paid, and if he fail to pay the 2s. the obligation shall be void; it shall be construed, that if he pay 7l. the obligation shall be void, and if he fail to pay the 2s. it shall be in force. R. 1 Lev. 77. R. 2 Mod. 285. [Dougl. 284.]

If the condition be, to give an account, 2d Nov. or to render him to prison upon an action then commenced; it shall be intended of an action commenced 2d Nov. and not of any action that shall be commenced at any time after during his life. R. 3 Lev. 137.

But if the words of a condition are insensible, the obligation will be single; as, if it be, to pay 2s. per week, and if default be in payment, that the obligation shall be void. R. 1 Sid. 105. Ray. 68. 1 Lev. 77.

If the condition be, whereas A. stands indebted in 50l., if the said A. do not pay the 50l. the obligation shall be void. R. Sal. 463.

Whereas the above-bounden A. shall and will pay, without saying, if he shall, &c. R. 2 Bul. 133.

If the condition does not mention any sum. R. 2 Bul. 156.

So, an obligation will be single, if the condition was impossible, at the making, or against law. Vide Condition, (D 1. 7. 8.)

[Where the question is, whether the sum be intended as a penalty or not, if a certain damage, less than that sum, is made payable on the face of the same instrument, in case the act intended to be prohibited be done, the sum shall be construed to be a penalty. 2 B. & P. 346.]

[Where an agreement contains a variety of stipulations, and a sum is annexed to a breach of performance, that sum must be considered as a penalty, not as liquidated damages. 2 B. & P. 346.]

[Where the sum is denominated a "penalty," it cannot be considered as stipulated damages. 3 B. & P. 630.]

[Where the condition of a bond is for the performance of certain work within a specified time, and the payment of a certain sum weekly for every week beyond the time, during which the work shall remain unfinished, such payments are to be considered not as penalties but as liquidated damages. 2 T. R. 32.]

[Where one gives a counter-security to another, containing a covenant to pay an annuity, and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed, that in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specifically, being the price of the annuity; it is not necessary to assign breaches under 8 & 9 W. 3. c. 11. s. 8., but execution may issue for the whole sum. 2 Smith, 66.]

[See

[See the case of Wilson's Charity. Lofft, 555.]

[A bond for performance of covenants or agreements is only a security or the extent of the penalty. Dougl. 49. 6 T. R. 303. 2 T. R. 388. 1 East, 436.]

[Where there is a special penalty in a covenant, the party may either go for the penalty or for damages. 1 Blk. 395.]

[There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring debt for the penalty and recover, when he cannot afterwards resort to the covenant; or he may proceed upon the covenants, and recover more or less than the penalty, *toties quoties*. 4 Burr. 2228.]

[Where a penalty was subjoined to a charter-party, containing various stipulations; held, that damages might be recovered beyond it. 13 East. 343.]

[A bond is forfeited to the breach of any part of the condition. 7 T. R. 97.]

[Held in this case, that where the penalty of a bond is sufficient to recover the real demand, the plaintiff, in an action thereon may recover beyond the penalty, and damages for its detention. 2 T. R. 388. But afterwards it was decided that he cannot recover beyond the penalty. 6 T. R. 303. And consequently that the action may be stayed on payment of penalty and costs, in equity. 2 Anst. 525., accords with this latter doctrine. 2 Price, 20.]

[On bond to pay interest half yearly, and the principal in three years; judgment shall be entered on failure of paying interest, but with a stay of execution on discharging it. 2 Blk. 706.]

[Proceedings on a bond for payment of money by instalments, and on default to stand in force for the whole sum then due, shall not be stayed on payment of the instalments in arrear. 2 Blk. 958.]

[When a defendant is charged in execution, with the penalty of a bond, it may be reduced to principal, interest, and costs. And interest due on a note of hand, for which no damages were given by the verdict, shall not be covered by this penalty. 2 Blk. 760.]

[If a judgment be recovered on a bond, though it be a foreign judgment; in an action on the judgment, interest may be recovered, in damages, beyond the penalty of the bond. 1 East, 436.]

[A lapse of 20 years, but not less, without any demand made, or payment of interest upon a bond, affords in itself grounds whence payment may be presumed. To raise such a presumption after the lapse of a shorter period, additional circumstances must be adduced, such as that a settlement of accounts has taken place, since the bond became due, or the last payment was made thereon, in which no notice is taken of the bond. 1 T. R. 270. 1 Burr. 434. 4 Burr. 1963.]

## (F) When an obligation will be joint.

If many bind themselves by these words, *obligamus nos*, it will be a joint obligation, and all must be joined in an action thereon. Vide Pleader, (2 V 2.)

So, if the words are, *obligamus nos et quemlibet nostrum conjunctim*. 3 Leo. 206. Mo. 260.

If three are bound to account for all money received by himself, or by others by his means or procurement, it will be joint. Hard. 314.

So, if an obligation be to two for 20*l.* *solvend.* 10*l.* to the one, and 10*l.* to the other, it will be joint, and the last words shall be rejected. Qu. Dy. 350. Acc. Ibid. in marg. et per Hob. 172.

### (G) When joint, or several.

But if many bind themselves by these words, *obligamus nos et utrumque nostrum*, the obligation is joint and several, and all may be sued jointly, or each severally. 2 Rol. 148. l. 35. Dy. 310. b. cont. Dal. 85.

Or, *obligamus nos vel utrumque nostrum*, in the disjunctive. 2 Rol. 148. l. 40.

So, if it be *obligamus nos et quemlibet nostrum*. 2 Rol. 148. l. 33. Dy. 310. b. Dal. 85.

So, if two bind themselves, *et alter eorum*. Dy. 310. b.

Or, several, *et quilibet eorum*.

Or, two *et uterque eorum* in 60*l.* R. 2 Cro. 45.

So, a bill obligatory may be several to many; as, if A. acknowledge, that he has received 20*l.* to the use of B. and C. equally to be divided, each has an action for 10*l.* For there may be several bills to several persons in the same deed. Dy. 350. a. in marg. R. Cro. El. 729.

### (H) When several only.

But if many execute an obligation, with a condition, to pay all money received by himself, or by others for him, or by his procurement, each shall be bound for himself only. R. Hard. 314.

### (I) Who are bound by an obligation,

#### (I 1.) An executor, or administrator.

An executor or administrator is bound by an obligation, though he be not named. 2 Rol. 149. l. 50. Dy. 23. a. Vide Covenant, (C 1.)

So, the ordinary, if he administers. 2 Rol. 149. l. 55:

#### (I 2.) A survivor.

Where the act to be done ought to be by all jointly, if one of them dies, the survivor shall not have advantage of it: as, if by indenture tripartite between A. of the first, B. of the second, and C. of the third part, it be agreed, that A. shall find diet, &c. for B. and C. his wife, and if A., B. and C. dislike to live together, A shall permit B. and C. to have such land: if B. die, and C. will not live with A., she shall not have the land, for the power to dislike does not survive. R. Latch. 162.

### (K) When a bond shall be presumed to have been discharged.

[The circumstance of 20 years having elapsed without any demand made is of itself a presumption that a bond has been satisfied. 1 T. R. 270.]

[But

[But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as, if an account between the parties has been settled in the intermediate time; without any notice having been taken of such a demand. *Ibid.*]

[Yet length of time is no legal bar; it is only a ground on which the jury may presume satisfaction. *Ibid.*]

## (K) Recognizance.

[*Vide CERTIORARI.*]

As to a recognizance by the st. 23 H. 8. *Vide Statute Staple, (B).*

By the common law, the chancellor, the chief justices, and justices itinerant, have power to take recognizances.

So, every judge of the realm. *Vau.* 203.

And this he may do in any part of England, in term or out of term. *Bro. Recognizance, 20. Hob. 195. Vau. 103.*

So, the king may give authority to any by commission to take recognizance of such a one, and return it into chancery. *F. N. B. 267. A.*

And upon such a recognizance returned, execution shall be sued in chancery, as upon another recognizance there.

So, if a suit be depending in a county court between A. and B., by writ or by plaint, the sheriff may take a recognizance of the one or the other. *F. N. B. 133. A.*

So, the sheriff shall take a recognizance under 40s. though no suit be there depending. *Ibid.*

A recognizance in chancery shall be inrolled.

And if the time be elapsed, and it be afterwards inrolled by special order it shall have relation to the date. *2 Ver. 234.*

Though a judgment, &c. intervene. *Ibid.*

But a recognizance is not usually allowed to be inrolled, after the time elapsed, but with caution, that it shall not prejudice purchaser. *2 Ver. 751.*

And if it be not inrolled, it shall be taken or paid, only as an obligation or a specialty. *R. 2 Ver. 750.*

If a recognizance before a sheriff be not paid, there shall be a writ to the sheriff, that he, by a *levari facias*, levy the money. *F. N. B. 133. B.*

If the sheriff does not do it, there shall be an *alias*, *pluries*, and attachment against him. *F. N. B. 133. B.*

So, the sheriff may levy by *distringas*, upon which also lies an *alias*, *pluries*, and attachment. *Ibid.*

And the sheriff may sell the goods levied. *Ibid.*

But if the recognizer plead payment, or deny the recognizance, the sheriff cannot make execution. *Ibid.*

**Pleadings concerning obligations.** — *Vide PLEADER, (2 G 12. — 2 W. 9. 16, &c. 46.)*

**Relief in equity concerning obligations.** — *Vide CHANCERY, (4 D 1, &c.)*

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## OBSTRUCTION.

*Vide ACTION UPON THE CASE for a DISTURBANCE, (A 2.) — CHIMIN, (C 5, &c. — D 8.)*

OBVEN-

## OBVENTIONS.

Vide DISEMES, (B 1.) — PROHIBITION, (G 11.)

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## OCCUPANT.

Vide CHANCERY. — ESTATES, (F 1, 2.)

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## ODIO ET ATIA.

Vide IMPRISONMENT, (L 3.)

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## OFFICE.

Vide ACTION UPON THE CASE for a DECEIT, (A 6.) — ACTION UPON THE CASE for a DISTURBANCE, (A 5.) — ACTION UPON THE CASE for NEGLIGENCE, (A 2.) — CONDITION, (S 1, 2.) — FRANCHISES, (F 30, &c.) — LEET, (L 11.) — LONDON, (K 1, &c. — L 4.) — OFFICER, per totum. — PARLIAMENT, (L 29, &c. 33. 37.) — PLEADER, (2 P 1. — 2 W 25. 27.) — PREROGATIVE, (D 67, &c. 83, 84. 89.) — PRIVILEGE, (B). — PROHIBITION, (F 4. — G 4.)

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### (A) **Officer, how created.**

The king is the fountain of all power and authority, and by his prerogative has the nomination of all officers originally. Vide Prerogative, (D 37.) Vide Justices.

[So, the king may exempt from serving particular offices, provided there is a sufficient number of persons left to serve the office. 1 T. R. 679.

The king cannot create an officer without the words, *constituimus* such an one in such an office, &c. for the words *concessimus*, the office to him, without the other, are not sufficient. 2 Rol. 152. l. 40. Hard. 351. 356.

He cannot grant ancient offices in other manner or form than was usual, if the form be not altered by parliament: as, creating by writ where before it was by patent. 4 Inst. 75.

Or, for life, where always before it was granted at will only. 4 Inst. 87.

The grant of an office, *una cum feodis pertinent.*, does not grant any fees, if it be not an office by prescription. Jon. 281.

He cannot grant an office to a bishop for his life, to his successors for ever; for he takes the office in his natural, and not in his politic capacity; and therefore, the grant over to his successors is void. R. Mo. 809.

But in a grant of the mastership of an hospital, &c. words of nomination are sufficient; for he shall be in by the constitution upon the foundation. R. Ca. Ch. 215.

So,

So, in a grant of a new office, the gift of a fee, casual or annual, is not necessary. Cont. 27 H. 8. 23. R. acc. Mo. 809. — Acc. for he shall have a *quantum meruit* for his labour. Hard. 351. 356.

So, a grant of a relative office, as parker, housekeeper, &c. is sufficient by the word *concessimus*. Hard. 356.

(A 2.) Without brocage or affection: — [Herein what offices are saleable.]

By the st. 12 R. 2. 2. the chancellor, treasurer, privy seal, lord steward, chamberlain, clerk of the rolls, justices of the one bench and the other, and barons of the exchequer, &c. shall be sworn, not to make justices of peace, &c. or other officer or minister of the king, for any gift, favour, or affection.

And none who pursues by himself, or other, privily or openly, to be put in any office, shall be put therein, or in any other, but they shall make all such officers of the best and most sufficient.

This statute is worthy to be put in execution. Co. L. 342. a.

### (B) Grant of an office.

(B 1.) To whom it may be made.

The grant of an office generally may be made to any person whom the king pleases; for the king has an interest in his subject, and a right to his service. 1 Sal. 168.

And therefore, an information lies against him who refuses an office, being duly elected.

And he shall not be excused for his neglect to qualify himself according to law. R. 1 Sal. 168.

(B 2.) To a woman: — [What offices a woman may execute.]

So, the grant of an office of government, which may be exercised by a substitute or deputy, to a woman, will be good: as, a woman may be made regent of the kingdom. Cal. 201.

So, an office of inheritance may descend to a woman, and by consequence may be granted to her; as, the office of marshal of England. Cal. 201.

So, a woman may be a gaoler 2 Inst. 382.

A commissioner of the sewers. Cal. 202.

So, she may have the custody of a castle. R. 2 Cro. 18.

So, she may be a forester, who shall make a deputy to attend the eyre, and he shall be there sworn. 4 Inst. 311.

[A woman may be sexton of a parish, and may vote in the election of one, Str. 1114.]

[So, a woman may be appointed an overseer of the poor. 2 T. R. 395. where all the cases, as to the offices women are capable of filling, are collected.]

(B 3.) To an infant.

So, a ministerial office may be granted to an infant, *exercend. per se vel deputat. suum*. R. 2 Rol. 155. l. 10.

As, the office of register of a bishop, granted to A. *exercend. per se vel*



*vel deputat. suum* after the death of *B.*, will be good, whether *A.* be of full age at the death of *B.*, or an infant. R. 2 Rol. 153. h. 10. 20. Jon. 311. Cro. Car. 280. 556.

So, the steward of a court-baron. Cont. Co. L. 3. b. R. Cro. Car. 556. Vide Copyhold, (R 5.)

So, the custody of a gaol. 2 Inst. 382.

#### (B 4.) To several.

So, a ministerial office may be granted to two or more; as, the office to be clerk of the crown in B. R. or Chancery. 11 Co. 3. b. 2 Rol. 152. l. 50. Vide 4 Mod. 17.

Steward of a court-baron. 2 Jon. 127. Vide Copyhold, (R 5.)

*Custos brevium.* Sho. 289. Cont. Dy. 149. b.

So, an office established by act of parliament, though it be in part judicial; as, auditor of the court of wards. R. 11 Co. 3. 2 Rol. 152. l. ult. Adm. 4 Mod. 17.

So, chancellor of a bishop, where it is warranted by usage. R. 4 Mod. 18. Sho. 289. Sal. 465.

So, a corody certain may be granted to two. Dy. 149. b.

So, a grant to two, to be one of the auditors, or a clerk of the crown, &c. will be good; for they are but one officer, though two persons. R. 11 Co. 3.

If a grant be to two, without saying, and to the survivor, if one die, the survivor shall not have it. Sal. 465. R. 11 Co. 3. b.

But a judicial office, established at common law, cannot be granted to two or more; as, the office of chief justice, or other judge. 4 Mod. 17. 2 Rol. 152. l. 47.

Nor, the office of admiral, for it is judicial. 4 Inst. 146.

Nor, the office of prothonotary. 2 Rol. 152. l. 45. in C. B. for it is not warranted by usage; but the office of prothonotary in B. R. may be in two persons. Per Holt, Sho. 289.

Nor, a corody uncertain. Dy. 149. b.

If the king grants an office to two and the survivor, and afterwards grants to *A.* when the office *vacare contigerit*; the grant shall not take effect, though it may be granted in reversion, till both die, &c.; for during the life of either, the office is not entirely vacant. 11 Co. 4. b.

#### (B 5.) To whom not: — To a person who is incompetent.

But an office, which concerns the administration or execution of justice, the king's revenue, the public good, the interest or safety of the subject, if it be granted by the king, or a common person, to him who has not knowledge to execute it, it will be void. 2 Rol. 153. l. 30. Co. L. 3. b. 2 And. 119.

And the court may refuse his admittance, if he does not make a sufficient deputy. Hard. 130.

#### (B 6.) Or, has an office incompatible: — What shall be such.

So, the grant of an office to one who has another office incompatible, is not good; for the first office will thereby be void. Doug. 398. (383.) n.

As, if a forester by patent for life, be made justice in eyre of the same forest, *pro hac vice*, the office of forester will be void; for it is incompatible, being subject to correction by the justices in eyre. 4 Inst. 310.

So, if the warden of a forest be made justice in eyre. Ibid.

Or the steward, or justice of the forest be made justice in eyre. Ibid.

If a justice of C. B. be made a justice of B. R. Dy. 159. Cro. Car. 127, 128.

If the remembrancer of the exchequer be made a baron of the exchequer, the first office becomes void. Dy. 197. b.

So, if a town-clerk be made alderman. Dy. 332. b. in marg. Vide post, (K 5.) Vide Franchises, (F 27.)

Or, mayor. Semb. 1 Sid. 305.

[Or, if a jurat be elected town-clerk. 2 T. R. 81.]

So, if a forester, keeper of a walk, or other inferior officer, in a forest accept of being verderor. R. Jon. 295.

So, a justice of B. R. or C. B. cannot take another office, or fee, except of the king. 4 Inst. 100.

So the chief justice of C. B. cannot be prothonotary, or clerk of the papers in the same court. 1 Sid. 305.\*

A bishop cannot have a benefice by *commendam* in his own diocese; for he cannot visit himself. Ibid.

But the chief justice of C. B. being made keeper of the great seal continues chief justice. Cro. Car. 600. 1 Sid. 338.

So, a justice of C. B. may be chief baron of the exchequer. 1 H. 7. 10. b.

So, by a custom, the same person may be a judge, and an officer to execute process, for he acts in different respects; as, where bailiffs, or mayor and bailiffs are judges in the court of a borough, they may also be officers to execute the process of the same court. R. Cro. Car. 138. Jon. 193.

The bailiff of a manor may be steward of the same manor. 2 Cro. 178.

A mayor, who is judge of the court, may also be the gaoler, who has the custody of the prisoners committed by the same court. R. Cro. El. 76.

(B 7.) For what estate it shall be granted:— In fee.

The king may grant an office, which relates to the execution of justice in fee; as, the office of sheriff. 9 Co. 97. b.

Or, the office of the custody of a gaol. 9 Co. 97. b.

(B. 8.) In tail.

So, an office, may be granted to one and his heirs male of his body: as, a grant of the office of chamberlain of the exchequer. 11 Ed. 4. 1. a.

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\* Knevit was chief justice and chancellor together in the time of Edward the Third. Dyer, in marg. 159. a.; and Lord Hardwicke in the time of George the Second. 2 T. R. 86.

## (B 9.) For life.

So, an office, that concerns the administration of justice, may be granted to one for his life. 9 Co. 97. b.

So, it may be assigned to trustees in trust for the assignor for his life. Dub. 3 Mod. 145.

(B 10.) *Quamdiu se bene gesserit.*

So, by an address to the king by the parliament, it was desired, that the office of judges should be granted *quamdiu se bene gesserint*. 3 Rush. 336. [Vide the st. 1 Geo. 3. 23. whereby the commissions of judges are continued, notwithstanding the demise of the king.]

## (B 11.) At will.

So, an office, that concerns the administration or execution of justice, may be granted at will. 9 Co. 97. 3 Mod. 149.

If it be granted *durante bene placito*, it shall not be determined at the will of the party, but only at the will of the king; and therefore, the party may surrender, and if forfeited, it shall be found by inquisition; and till a surrender, or forfeiture, he continues officer. R. Sal. 466.

## (B. 12. a.) For years.

But an office, to which a trust is annexed, or which concerns the administration of justice, cannot be granted for years; for then it would go to the executor, or administrator, or ordinary, and might be seized, upon outlawry, &c. R. 9 Co. 97.

And therefore, a grant of the office of marshal of B. R. for years will be void. R. 9 Co. 97. R. Cro. Car. 587. Jon. 463.

Or, a grant of the office of chirographer, *custos brevium*, or king's silver. 9 Co. 97. b.

So, a grant of the office of clerk of the crown. Ibid.

And of clerk of the pipe, remembrancer, &c. in the exchequer. Ibid.

Yet an office which does not concern justice, may be granted for years: as, the office of garbler of spices granted by the mayor and commonalty of London, pursuant to the st. 1 (2d) Jac. 19. [or 6 And. 16.] R. Hard. 48.

The office of aulnage, prisage, &c. for no attendance upon a court is required. Hard. 48, 49.

The office of policies of insurance. 1 Ver. 12. R. Hard. 351. 357.

The office of king's printer. Hard. 352.

So, the office of postmaster. Ibid.

## [(B. 12. b.) Where no estate is expressed.]

[An appointment to an office without limitation as to time, is usually considered as an appointment for life. But where it would be inconvenient to consider it a permanent one, the rule is different; as where the appointee finds sureties for his duly accounting; here his sureties may die, or he fall into bad circumstances. 4 M. & S. 324.]

(B 13.)

**(B 13.) When in reversion.**

A ministerial office may be granted in reversion. 11 Co. 4. a. 2 Rol. 154. l. 5.

As, the office of register of a bishop. R. 2 Rol. 154. l. 20. R. Jon. 264. Cro. Car. 259. 279. Jon. 311.

Steward of a court-baron. 2 Lev. 245.

The office of commissary or official to a bishop, where the grant in reversion is warranted by usage. R. Jon. 264. Cro. Car. 259. R. 4 Mod. 17. Vide Estates, (G 5.)

So, by custom and usage, a judicial office may be granted in reversion. Hard. 357.

**(B 14.) When not.**

But a judicial office cannot be granted in reversion. 11 Co. 4. a.

Nor, an office partly judicial, and partly ministerial; as, the office of auditor of the court of wards. R. 11 Co. 4. b.

Or, the master, surveyor, or attorney of the court of wards. 11 Co. 4. a.

Steward of a court-leet. R. 2 Lev. 245. Acc. Dy. 80. b.

So, the reversion of an office cannot be granted, by the name of a reversion: for there is no reversion in it. Cro. Car. 279.

So, the office of register shall not be granted in reversion, where the usage does not warrant it. Jon. 311. Cro. Car. 259. 279.

So, if an office be granted in reversion, the grantee, upon the death or forfeiture of the former officer, must discharge his duty at his peril, without notice given to him of the vacancy. 1 Sid. 81.

**(C a.) Who may assign his office.**

An office in fee granted by a subject generally, may be assigned. Semb. 9 Co. 48. b. Jon. 113. Hard. 425.

Though it be an office of trust; for heir includes assigns. Jon. 113.

So, it may be settled and confined to the heir male of the body of the grantee. Jon. 114.

Or, granted by him to A. and B. to be re-granted to himself and the heirs male of his body. Ibid.

Or, a covenant may be, to stand seized of it to the use of another. Jon. 118. Comb. 96. 3 Mod. 145.

So, an office granted to one and his assigns may be assigned. Hob. 170. Jon. 113.

And the office of a teller in the exchequer may be granted to a man and his assigns. 1 Ver. 12. Hard. 425.

But an office of trust cannot be assigned, without the assent of him who granted the office. Jon. 121. R. 11 Ed. 4. 1.

Or, if the patent does not mention deputy, or assigns. Jon. 113. 11 Ed. 4. 1.

Though it be granted in fee. Jon. 121. Hard. 426.

As, if the marshal of B. R. in fee assigns his office without assent of the court. Dub. 3 Mod. 151.

So, the office of carver, granted to A. and his heirs, cannot be assigned to another; for it is an office of trust and confidence. Jon. 121.

Nor, the office of forester. 4 Inst. 315.

Vol. V.

O

[(C b.)

**[(C b.) Privileges and obligations of officers.]**

[An officer is entitled to his privileges, though he has not taken out his writ of privilege. 8 T. R. 375.]

[Where a duty is thrown upon a body, consisting of several persons, each is individually answerable for a breach of that duty, unless he did all that in him lay to discharge it. 5 T. R. 607.]

[No officer can certify his own mistake. He must make an affidavit of the fact. 1 Anst. 79.]

**(D) Deputy.**

**(D 1.) Who may make one.**

Every officer, who may assign his office to another, may make a deputy: for *cui licet quod est majus, quod minus est magis licet*. 9 Co. 48. b.

And therefore, every officer in fee may make a deputy. Ibid.

So, he who holds in fee by a personal service, may make a deputy; for the estate may descend to a woman, infant, &c. who may be incapable to do it in person. 2 Inst. 34.

So, where nothing is required in an officer but superintendancy, he may make a deputy. 3 Mod. 150.

And, therefore, a constable may make a deputy; for he is not a judicial officer. R. 1 Rol. 591. A. Mo. 845. 3 Bul. 78. 1 Rol. 274. Per two J. 1 Lev. 233.

So, a woman forester in fee, may make a deputy in the *eyre*, who shall be sworn. 4 Inst. 311.

So, every ministerial officer may make a deputy; as, a chamberlain, or alderman. 1 Rol. 274.

An auditor in the exchequer. 4 Inst. 106.

An escheator, sheriff, &c. 1 Rol. 274. 4 Inst. 226.

A dean. 1 Rol. 274.

A parish-clerk. Dub. F.g. 273.

So, if an office of labour of small regard be granted to a peer, he in respect of the dignity of his person may make a deputy: as, if a peer be made steward of a court-baron, parker, &c. 9 Co. 49.

[If parceners cannot agree in nominating a deputy or clerk, chancery will direct them to draw lots who shall nominate first. 2 Atk. 482.]

Vide post. (D 2.)

**(D 2) Who not.**

But a judicial officer cannot make a deputy; as, lord chancellor, 4 Inst. 88.

A justice of the one bench or the other.

A justice in *eyre*, till authorised by statute. 1 Rol. 274.

High-steward of the realm; for he is a judge upon the trial of peers. 4 Inst. 59. in marg.

So, a ministerial officer, where the office is granted to be executed by him in person, cannot make a deputy. 3 Mod. 150.

Nor, if it imports a trust or confidence in the person; as, to be squire to the king's body, if a deputy is not allowed by his patent. 11 Ed. 4. 1.

Yet

Yet if a judicial office be granted *tenend. per se vel deputatem*, he may make a deputy: as, the recorder of London. 1 Lev. 76.

So, the recorder in several other cities and boroughs. Ibid.

Steward of the borough-court in Southwark. Ibid.

So, steward of the palace court. Cont. per two J. but by the other acc. Ibid.

So, where ancient usage allows a deputy, a judicial officer may make one; as, constable, and earl marshal. 4 Inst. 126. 128.

### (D 3.) Power of a deputy.

A deputy has power to do every act which his principal might do. R. 1 Sal. 95.

And he cannot be restrained to some particulars of his office; for that would be repugnant to his being deputy. Ibid.

So, a deputy may depute another to do a particular act in his office. 1 Sal. 96.

But a deputy cannot make a deputy; for that imports an assignment of all his authority, which is not assignable. Ibid. 39 H. 6. 33, 34.

[If a deputy covenants to execute the office for certain fees, and to account for the rest, and new duty and new fees are afterwards added by statute, the deputy shall account for the new fees. Per Hardwicke C. J. and Eyre C. J. Str. 1027.]

### (D 4.) How his act affects his principal.

An officer, generally, shall answer for his deputy. 2 Inst. 466.

So, generally, an act of the deputy without the assent of his superior, will not be a forfeiture of the office; as, an act of an under-sheriff or under-bailiff is not a forfeiture of the office of sheriff or bailiff in fee. 2 Inst. 190.

### (D 5.) How a deputy ought to act, and responsibility of.

A deputy, regularly, ought to act in his office in the name of his principal. 1 Sal. 96.

As, an under-sheriff does all acts in the name of the sheriff. Ibid.

And all his acts are in right of his principal, and as his servant. 11 Ed. 4. 1. b.

But an act by a deputy in his own name will be good, except in special case. 1 Sal. 96.

### [(E a.) Miscellaneous points.]

[Suspension is not equivalent to deprivation; so that, during a suspension, the office is still full. 2 T. R. 351.]

[Where two offices are incompatible, the acceptance of the last implies a surrender of and vacates the first, whichever be the superior office of the two. 2 T. R. 81. Dougl. 398.]

[No action lies for the owner of an office against an intruder for gratuitous donations received; *secus*, for known and accustomed fees. 6 T. R. 681.]

[A promise to pay a premium on the sum which a purchaser (to be procured by the plaintiff) would give for defendant's place of surveyor

of baggage in the port of London, is void under 5 & 6 Edw. 6. c. 16. s. 2. 2 Wils. 133.]

[Where A. through the interest of B. was appointed to the office of customer of Carlisle, having previously signed an agreement that his name was made use of in trust for B., and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use; this agreement was holden void, 1. At common law. 2. On statutes 12 Rich. 2. c. 2., and 5 & 6 Edw. 6. c. 16. 1 H. B. 327.]

[One in the exercise of a public office, though without authority, obliges himself to discharge the duties annexed to it. Therefore, an indictment against an officer for a breach of duty, need only state that he exercised the office. 5 T. R. 607.]

[Where the statute or common-law requires a particular act to be done by an officer, it is a sufficient averment in an indictment for neglecting it, that it was his duty to perform it. But where the act of duty is defined by either, but arises out of special circumstances, those circumstances must be set forth. 5 T. R. 607.]

[For a misfeasance in office, an action will lie against the deputy, if he is a substantive officer, as well as against the principal. 5 Burr. 2721. 3 Wils. 454. 2 Blk. 910.]

### (E b.) Officers of State.

Officers are public or private.

Public are, officers of state, officers of justice, or officers of the king's household.

As to the chancellor, master of the rolls, and other officers in Chancery, vide Chancery, (B 1, &c.)

As to the judges and officers in B. R., C. B., and exchequer, vide Courts, (B 4. — C 2, &c. — D 8, &c.)

As to justices of assise, vide Assise, (B 21, &c.)

As to justices in eyre, oyer and terminer, gaol-delivery, &c. vide Justices (E 1, &c. — F — G 1, &c. — H.)

As to justices of peace, vide title Justice of Peace.

As to sheriff, vide Viscount.

#### (E 1.) High treasurer.

A prime officer of state is the high treasurer. Vide Courts, (D 8.)

The chief justicier had the management of the king's treasure, as it seems *temp.* W. 1 & 2. Mad. 54.

*Temp.* Steph. and H. 2. &c. he was a distinct officer. Mad. 54.

#### (E 2.) High constable.

The office of high constable was hereditary at first. Sp. Glos. 184. Mad. 27.

So, formerly, there was a high constable by tenure.

And if a manor held by such service descended to co-heirs, the husband of the eldest, or if none of the women was married, a deputy might officiate, such as should be approved by the king. Sp. Gl. 184.

The

The office of constable was eminent in war and peace. Sp. Gl. 185. Mad. 27.

So, it may be granted for special cause *hac vice*, as it was 7 Car. — 2 Rush. 112.

[A high constable may be appointed *de novo* for a town erected into a county of itself by charter many years before, although no such officer from the time of granting the charter had been appointed. 6 T. R. 228.]

But by the st. 13 R. 2. st. 1. c. 2. upon complaint, that the court of the constable and marshal had inroached to itself contracts, covenants, trespasses, debts, *detinues*, and other actions, &c. it is declared, that the consuance of contracts, touching deeds of arms, or war out of the realm or within, which cannot be determined by common law, with other usages to those matters pertaining which other constables have used, belong to the constable. Vide Courts, (E 1, &c.)

### (E 3.) Marshal.

Many of the king's officers are called marshals. Mad. 29.

The principal is *mareschallus regis vel mareschallus Angliæ*, called earl marshal. Mad. 30.

And this office was granted for life, in tail, or in fee. 4 Inst. 128.

Was exercised in war in the army, in peace within the king's court. Mad. 33.

In the king's court, he provides for the security of the king, for the distribution of the apartments, for the order and peace of the house, and for the determination of controversies there. Mad. 33. Vide Courts, (E 1, &c.)

The marshal of B. R. was his deputy, and derived from him. Mad. 33. Sal. 439. 602.

So, his office cannot be granted, reserving the place of chamberlain of the prison of B. R., for it is incident. R. Sal. 439.

### (E 4.) High steward : — The antiquity and authority of his office.

The high steward was an office at the time of the Conquest, or before, of great authority. 4 Inst. 58. Mad. 34.

The office was hereditary from the time of the Conqueror till H. of Bolingbrook, son of J. of Gaunt, D. of Lancaster; for *temp.* W. 2. and H. 1. it was enjoyed by Hugh Grantsemenel, who held the barony of Hinkly by his office, and by the marriage of Petronel, his daughter and heir, to Bellamont earl of Leicester, came to the earls of Leicester, till it was forfeited *temp.* H. 3. by the attainder of Simon Montfort earl of Leicester, who *anno* 50 of his reign granted it to Edmund his second son, from whom it descended to H. of Bolingbrook, who was the last that had inheritance in the office. 4 Inst. 58. Mad. 35.

The authority of high steward was to survey and rule *sub rege totum regnum et omnes ministros legum tempore pacis et guerra*, &c. 4 Inst. 59.

And therefore, since the time of Hen. of B. it hath been granted only *hac vice*. Ibid.



## (E 5.) Upon the trial of a peer.

Since the time of H. 4. he hath ever been appointed but *hac vice* for the trial of a peer. 4 Inst. 49. Vide Dignity, (F 1, 2.)

And then his authority is confined to the particular indictment. 4 Inst. 59.

If the chancellor is a peer, he is usually appointed high steward.

Or, the lord treasurer. Mo. 620.

Or, any other lord may be appointed.

And he shall be appointed by patent, *hac vice, ad audiend. et terminand.* the high treason, &c. for which such an one is indicted, &c. Mo. 620.

And though he does not take any oath, he must proceed according to the laws and customs of the realm. 4 Inst. 59, 60.

After the trial the high steward cannot adjourn, but must dissolve his commission. R. Mo. 622.

Yet it was adjourned *temp.* H. 8. to the next day and then dissolved. Mo. 622. and R. that it might. Kelg. 57. 3 Inst. 31.

So, after trial the high steward, if execution be not done, by his precept may direct execution. 3 Inst. 31.

And after all the service is performed, his commission shall be dissolved by his breaking the white rod over his head. Ibid.

[The court of the high steward, and the court of the king in parliament, are different.]

[In the first, by the commission, (which is but in the nature of a commission of oyer and terminer,) the sole right of judicature is vested in the high steward, and resideth in his person, and without the commission no step can be taken in order to the trial; and when his commission is dissolved (which he declares by breaking his staff) the court no longer exists: he alone is judge of law and practice; the peers triers, mere judges of fact, are summoned by precept from him to appear before him on the day appointed by him for the trial. E. Ferrer's Case, 1760. Foster, 138.

[For the court of the king in parliament. Vide Parliament, (L 16.)

## (E 6.) Upon claims at a coronation.

So, usually upon every coronation, he has a commission, *hac vice* to hear and determine all claims of services to be done at the coronation. 4 Inst. 59.

## (E 7.) High chamberlain.

The office of high chamberlain, or *magistra cameraria*, was also hereditary, and by H. 1. granted to Alb. de Ver. and his heirs, as now to the Earl of Lindsey. Mad. 38.

And, therefore, the office shall descend to his heir general, and not to the heir male. R. Jon. 130.

Though it was covenanted 4 Eliz. that I. Earl of Oxford should stand seised of the office to himself for life, and afterwards to the use of his son and the heirs male of his body. Jon. 110.

## (E 8.) Secretary of state.

By the st. 31 H. 8. 10. a secretary of state, being a baron, shall take

take place of all other barons in parliament, not having any superior office.

And if no baron or peer, he shall sit on the uppermost part of the sacks in the midst of the house.

If the secretary be a bishop, he shall have precedence of all the bishops, except the archbishops. 4 Inst. 362.

But the secretary being a viscount, earl, duke, &c. shall not have precedence of others of the same degree. 4 Inst. 362.

A secretary of state *ratione officii*, has authority to commit any, accused of treason or other crime against the state. R. 1 Sal. 347. 5 Mod. 84. Adm. 2 Leo. 175. 1 Leo. 71.

[Has not power to grant general warrant to apprehend the authors, printers, and publishers of a libel. 2 Wils. 105. 3 B. M. 1742.]

[Nor, a warrant to enter the house of a person by name, author of a libel, to seize his papers, and detain him and them. 2 Wils. 244.]

[Note. This warrant, which was not only to apprehend Breadmore, the author of a seditious libel, but also to seize his books and papers, was called illegal in the gross; but had it been only to apprehend the person, *qu.?*]

[He has no power to grant warrant to search for, and seize a man's papers, in the first instance, on information of his being the author of a libel. 2 Wils. 275. Lofft. 1.]

[He is not a conservator or justice of the peace, *quasi* secretary, within 24 G. 2. c. 44. Ibid.]

[He hath power to commit for treason, and seditious libels, but (per Pratt, C. J.) not for smaller crimes. Ibid.]

[And a commitment by him for reasonable practices, without stating them, is sufficient. 7 T. R. 736.]

(E 9.) President of the council, and privy councillors..

Vide Roy, (E 2, &c.)

## (F) Officers of the household.

In the king's house are many officers: as, steward, treasurer, chamberlain, master-comptroller, cofferer, &c. 4 Inst. 131.

## (G) Coroner.

The coroner is an antient officer of the crown, who shall hold pleas of things concerning the crown. 2 Inst. 31. 4 Inst. 271.

And shall be of the county at large, or of a particular jurisdiction; as, of the verge, where by the common law the coroner of the county does not intermeddle. 4 Co. 46. b.

### (G 1.) Coroner in the king's house.

By the st. 33 H. 8. 12. the coroner of the king's household shall hereafter be named by the lord great master, or lord steward of the household.

And all inquisitions upon view of persons slain, in any palaces or houses of the king, shall ever be taken by the coroner of the household,

without the assistance of the coroner of any shire, by twelve or more of the yeomen, officers of the king's household, returned by the two clerks comptrollers, the clerks of the check, and clerks marshal, or one of them, on the coroner's precept to them.

And such inquisition by the coroner of the county is void, and shall be discharged. R. 4 Co. 46. b.

But, if the same person be coroner of the verge, and also of the county at large, an inquisition before him will be good. R. 4 Co. 46. a.

So, the coroner of the verge shall not take an inquisition, where the fact does not appear to be done within the verge. R. 4 Co. 47. a.

Though the coroner of the county join, and it be taken in the name of both. Ibid.

### (G 2.) Coroner in a county.

Temp. R. Alfred, coroners were ordained in every county. 2 Inst. 31.

And in some counties there are six, in some four, or two, in some but one; for no precise number is required. 2 Inst. 175. F. N. B. 163. L.

### (G 3.) How chosen.

The coroner shall be always chosen in full county by the freeholders, upon a writ *de coronatore eligendo*. 2 Inst. 174. By the st. 28 Ed. 3. 6.

And none can prescribe to make a coroner. Co. L. 114. a.

And therefore, upon the death or amoval of a coroner, a writ goes to the sheriff to choose another coroner. Reg. 177. a. F. N. B. 163. M.

Or, if more are dead, &c. to choose two or more. F. N. B. 164. A.

The election shall be upon view, or by a poll, as of knights of parliament or verderors.

When chosen, the sheriff shall give him the oath to do his office. F. N. B. 163. M.

And shall certify his election into chancery. F. N. B. 163. K.

And being chosen, his office does not determine upon the demise of the king. 2 Inst. 175. D. 1 Lev. 120.

### (G 4.) Who may be chosen.

By the st. W. 1. 3 Ed. 1. 10. *per tous les counties soient eslicus suffisant homes coroners, des plus loyals et plus sages chivallers, queux melius sachent, puissent, et violent a cel office entendre, &c.*

By the st. 14 Ed. 3. 8. one shall be chosen coroner, if he have not land in fee, in the same county, sufficient to answer all people.

By the st. 28 Ed. 3. 6. the coroner shall be chosen of the most convenient and lawful people in the same county.

So, a coroner ought to be of sufficient ability and knowledge to do his office. 2 Inst. 176.

And therefore, he shall be discharged, if he have not land, *cent. solid. terræ* in the same county. 2 Inst. 176. Reg. 177. b. F. N. B. 163, 164. N.

And

And where he cannot answer the *dues* in respect of his office, the county, as his superior, shall answer for him. 2 Inst. 175. 4 Inst. 114.

So, he shall be discharged, if he be *minus idoneus*. Reg. 177. F. N. B. 163. N.

If he be *communis mercator*. 2 Inst. 32.

If *negotiis occupatus, quod officio coronatoris vacare non possit*. Reg. 177. a. F. N. B. 163. N.

Or, *moratur in extremis partibus comitatus, per quod officium commodè exercere nequit*. Reg. 177. b. F. N. B. 164. N.

If, *sit languidus, senio, or paralyssi, &c. confect*. Reg. 177. b. F. N. B. 164. N.

If he be elected sheriff or verderor. Ibid.

Yet it is not necessary that he should be a knight. F. N. B. 164. N.

(G 5.) Jurisdiction of the coroner : — To take an appeal, &c.

The court of the coroner is a court of record. 4 Inst. 271.

And he has jurisdiction with the sheriff to take an appeal of robbery, or other felony, in the same county, in the county court; by the st. 3 H. 7. 1. H. P. C. 171. Vide Appeal, (F — G 4.)

And such appeal may be by bill. H. P. C. 171. 2 Inst. 32.

So, by the st. *de off. coron.* he may take an appeal of rape. Semb. H. P. C. 171.

And upon such appeal the coroner alone is judge, though by the st. W. 1. 10. the sheriff has the counter-rolls of appeals and inquests, with the coroner. 2 Inst. 176.

And therefore, a *certiorari* to the sheriff alone, for removing an appeal, is not well; for it ought to be to the sheriff and coroner. 2 Inst. 176. H. 171.

By the st. 4 Ed. 1. *de off. cor.* if the appeal be fresh, and there appear apparent signs, as effusion of blood, or open cry, the appellee shall be attached, and find four or six pledges, otherwise but two pledges.

On appeal of wounds, the appellee shall be kept, till known if the party will live or die; and if he die, shall be kept; if he recover, and be maimed, or have a great wound, the appellee shall find four or six pledges; if but a small wound, two pledges.

One appealed as accessory shall be kept till the principal is attained.

But the coroner shall not proceed beyond an entry of the appeal and the count, and then deliver it to the justices. 2 Inst. 32.

The coroner may grant process to outlawry, but shall not award the exigent. H. P. C. 171.

(G 6.) By an approver.

The coroner alone may take an appeal of an approver of a felony in any county. H. P. C. 172.

And the confession of the felony by the approver before him is not traversible. H. P. C. 171.

But the coroner shall not make process upon such an appeal by an approver, but shall enter it upon the roll, and send it before the justices of gaol-delivery, who shall issue process to the sheriff of the foreign county to take the appellee. H. P. C. 172.

(G 7.)

## (G 7.) Abjuration.

The coroner shall take the abjuration of him that acknowledges a felony in the same, or another county. By the st. 22 H. 8. 14.; and 32 H. 8. 12. H. P. C. 172. Vide Abjuration (C).

And such abjuration is not traversable. H. P. C. 171.

## (G 8.) Breach of prison.

The coroner may inquire of breach of prison. Semb. H. P. C. 171.

And shall take the confession of such breach of prison, which is not traversable. Ibid.

## (G 9.) Treasure-trove.

By the st. 4 Ed. 1. *de off. cor.* the coroner ought to enquire of treasure-trove, who the finders, and who suspected of it, &c. in the same manner as of death.

And the persons suspected may be attached.

## (G 10.) Wreck.

The coroner has jurisdiction upon an arm of the sea, where a man may see from one shore to the other. H. P. C. 171. 4 Inst. 140. 271.

By the st. 4 W. 1. 3 Ed. 1. 4. the coroner shall seize the wreck, and see it valued, and delivered to the town.

So, by the st. 4 Ed. 1. *de off. cor.*

## (G 11.) To take an indictment.

By the st. M. Ch. 9 H. 3. 17. *nullus coronator teneat placita coronæ nostræ.*

But by the st. W. 1. 3 Ed. 1. 10. *coroners loyalment attachent et representent les ples de la corone.*

By st. Ed. 1. *de offic. coron.* the coroner, when certified, shall go to the place where any is slain, suddenly dead, or wounded, and command four, five, or six, of the next towns, to appear before him at a certain place, and by their oaths inquire, if they know where the person was slain, whether in a house, field, bed, tavern, or company, who guilty, or who present, men or women, and of what age; whether slain in the field or wood, where found, or brought thither, and how, on horse or cart, if known, or a stranger, and where he lodged last.

So, if a man die in prison, the coroner shall make inquiry. H. P. C. 170. Fl. 1. c. 26. s. 5.

If any are found guilty, they shall be committed, and those present, though not guilty, shall be attached till the coming of the justices. And the coroner shall go to the house of the guilty, and inquire what goods and what lands he hath, and of what value, and when valued deliver them to the township, who shall answer for all.

And after such inquiry, the deceased shall be buried.

And horses, boats, carts, &c. which are deodands, shall be valued and delivered to the township.

So, that the coroner, notwithstanding M. Ch. 17. may take an indictment upon the death of a man. 2 Inst. 32.

But only upon the death of a man, not for other felony. 4 Inst. 271.  
And

And this shall be, *super visum corporis*, otherwise it is void. 4 Inst. 271. H. P. C. 170.

And the body shall be dug up, if it be interred before the coming of the coroner. H. P. C. 170.

And the township shall be amerced for the interment, or suffering the body to putrify, before the coroner be sent for. Ibid.

So, if an indictment *super visum corporis* be insufficient, the coroner may dig up the body to take another indictment. R. 2 R. 3. 2.

But after being long buried, the coroner cannot dig it up without leave of the court. R. 1 Sal. 377.

If the body cannot be viewed, justices of peace shall inquire. H. P. C. 170. R. 2 Rol. 96. l. 30.

Or, justices of oyer and terminer. D. 1 Vent. 182.

Or, B. R. may appoint commissioners to inquire. Ibid.

Or, the grand inquest may inquire. D. 1 Vent. 352.

The coroner shall inquire of the flight of the felon. H. P. C. 170.

And such presentment is not traversable. H. P. C. 170. Per Hale, 1 Vent. 239. Per Cur. 1 Vent. 278.

By the st. 3 H. 7. 1. he shall inquire, if the town permitted the felon to escape.

By the st. 1 & 2 Ph. & M. 13. the coroner may bail as before, and shall take the examination of the felon and obligation, and shall certify them to the next gaol-delivery.

### (G 12.) Inquisition.

By the st. 3 H. 7. 1. the coroner shall certify an inquisition at the next gaol-delivery on pain of 5*l*.

By the st. 1 & 2 Ph. & M. 13. on an inquisition for murder or manslaughter, or accessory before, the coroner shall put in writing the effect of the evidence given to the jury, and shall bind over the evidence to the next gaol-delivery, on pain of being fined by the judge, and then certify such obligation and inquisition.

[The coroner, on returning a *felo de se non compos*, is not obliged to return the depositions. Str. 1073.]

But the coroner need not take an inquisition *ex officio*, if he be not required. R. 1 Sal. 377.

If there are several coroners in a county, any of them may take an inquisition of the matters aforesaid. H. P. C. 172.

But the first inquisition shall stand. Ibid.

And upon such an inquisition process lies to an outlawry. R. 2 Leo. 200.

The inquisition need not say, that the jury came out of the four next towns. R. 1 Sid. 204.

And if it finds a deodand, it is good, though *super sacramenta* is not repeated. Ibid.

And though the word *prædict.* is wanting. Ibid.

And though it does not show the place of the death. Ibid.

Though it has words superabundant. R. 3 Mod. 100.

And if it finds the substance, though defective in form, it may be amended. R. 1 Sid. 225. 259. 3 Mod. 101.

As,

As, if it omits, that he threw himself into the water, if it be found, *felonice submersus est*. R. 1 Sid. 259.

Or, omit the word, *murdravit*, if found a felonious killing. Per Twisd. 1 Sid. 259. Per Holt, 1 Sal. 377.

But it shall not be taken by intendment: and therefore, if found, *quod A. jugulum suum felonice et ut felo secuit*, without saying that it was mortal, and that he died thereby, it is bad. R. 1 Sid. 377.

If found, *quod A. felonice* put himself in *rivo et seipsum emergit, et sic se murdravit*; for, *emergit*, imports, that he came out of the river. R. 2 Lev. 140.

An inquisition *super visum corporis* is not traversable. Carth. 72. 2 Lev. 140.

[Inquisition *super visum corporis* of a man that hanged himself; filing of it stayed, on affidavit that the man died five years before, and the coroner only dug up a skull, which he assured the jury he knew to be the deceased's, and thereupon the inquisition was taken. Str. 22.]

An inquisition may be quashed, if there be proof of a misdemeanor in the coroner; as, refusal of evidence, &c. 1 Vent. 182. Per Cur. 1 Vent. 352. 3 Mod. 80.

[If in an inquisition *super visum corporis*, the year of our Lord in the caption is in common figures, it shall be quashed, for it should be in words at length, or at least in Roman numerals Str. 261.]

Or, if it finds a man *felo de se*, it may be traversed. Per Hale, 1 Vent. 239. Per Cur. 1 Vent. 278. R. 2 Jon. 198. 2 Lev. 852.

And after an inquisition quashed, the coroner shall take a new inquest *super visum corporis*. 1 Sal. 190.

[A new inquisition *super visum corporis* may be taken by leave of the court, but not without. Str. 167.]

[The court will make a rule to take up the body, on first inquisition being quashed. Str. 533.]

But a *melius inquirendum* will not be granted. Per Hale, 1 Vent. 182. Semb. 2 Jon. 198. unless it be for a misdemeanor in the coroner. 3 Mod. 238. Carth. 72.

And an inquisition that acquits a man shall not be traversed. Per Hale, 1 Vent. 239.

Yet, upon misdemeanor in the jury, a *melius inquirendum* shall be granted. Semb. 3 Mod. 80.

So, upon a misdemeanor in the coroner, and then a *melius inquirendum* goes to the sheriff, or commissioners, or justices of assise, who shall take examination upon affidavit, not *super visum corporis*. R. 1 Sal. 190. 2 Lev. 141. 152.

And a *melius inquirendum*, not being *super visum corporis*, may be traversed. Carth. 72. 2 Lev. 141.

[The coroner may take an inquisition on board a man of war, lying *infra corpus comitatus*, as in Portsmouth harbour; and if he is opposed by the captain, an information shall be granted. Andr. 231.]

[If the coroner omits to take an inquisition upon an untimely death, it may be done by justices of gaol-delivery, oyer and terminer, or of the peace; but it must be openly; (*qu.* if notice is not necessary; for

for it is an office of intitling?) and if secretly, it shall be quashed. 1 B. M. 17.]

[By st. 25 G. 2. c. 29. for every inquisition on a body, (not in prison,) in any place subject to county-rates, coroners shall be paid 20s.; and 9d. per mile for his journey.]

[But where they do not contribute to county-rates they are not entitled to those fees. 7 T. R. 52.]

[For inquisition on body dying in prison, what quarter sessions shall allow, not exceeding 20s.]

[For a body slain he shall have also 13s. 4d. by 3 H. 7.]

[If he takes more, he is guilty of extortion.]

### (G 13.) Process to coroners.

Process shall be directed to the coroners, where the sheriff is a party, plaintiff or defendant.

Or, if the sheriff be cousin to the plaintiff or defendant.

Or, if the array be quashed for partiality of the sheriff.

But if the sheriff be dead or amoved, process does not go to the coroners.

So, if any process goes to the coroners, all subsequent process issues to them, though the sheriff be removed. R. Mo. 356. 422.

And if the subsequent process be to the new sheriff, it is error. R. Mo. 356.

And shall not be helped after verdict by the st. 32 H. 8. 30. which remedies the misawarding of process. R. Mo. 356.

Yet, process to the coroner, where it ought not to be, is aided by the st. 32 H. 8. R. Dy. 367. a.

### (G 14.) Coroner, how punished:— For misdemeanour in office.

By the st. 14 Ed. 1. *exon. de inq. super coron.* the inquirers shall command the sheriff to summon the coroner or his heirs, and all his bailiffs and beadles, and shall swear the bailiffs to return eight men out of every town, six out of each village, and four out of each hamlet, out of which number the inquirers shall swear twelve, to make true presentment on such articles as they shall give them, viz.

*Si coronator personaliter accesserit pro officio faciendo de omnibus murdris, felonis, aut alium substituerit, et quoties, et quem.* Fl. l. 1. c. 18.

*Si gratis accesserit quoties requisitus, vel aliquid petiit, aut receperit.* Ibid.

*Si catalla felon. legaliter fuerint apreciata, et villata liberata.* Ibid.

*Si munera accepit pro falsa inquisitione faciendâ, catallis apreciend. ad minorem valorem.* Ibid.

*Si catalla falso irrotulavit, aut aliquid detinuerit.* Ibid.

*Si appella falso fecerit irrotulari, vel de rotulis extrahi.* Ibid.

*Si quid acceperit de villatâ ubi fecerit inquisitiones vel de corporibus mortuorum.* Fl. l. 1. c. 18.

*Si aliquem attach. ut ipsum gravaret.* Ibid.

*De thesauro invento.* Ibid.



*Si officium suum in omnibus, sine delatione, et gratis, fecerit, &c.* Ibid.  
*Et si coronator coram eis convictus sit de prædict. vicecomiti liberetur donec manucapt. sit ad satisfaciend. regi, &c.* Ibid.

By the st. 3 H. 7. 1. if a coroner neglect to make inquisition, or certify it, he forfeits 5*l*.

If he refuse to execute his office, when sent for, he shall be fined and imprisoned. H. P. C. 170.

[On inquisition on one that hanged himself, jury satisfied of his lunacy, coroner tells them finding him *felo de se* was matter of course, and thereupon they find accordingly; afterwards hearing what the consequence would be, they apply to coroner to take the verdict lunacy; he drew up the inquisition so, and they all set their hands and seals. But on *certiorari*, he returned the first inquisition, and the court stayed filing, and committed coroner. Str. 69.]

[If a coroner misbehaves, or lives out of the county, on petition from the freeholders, and affidavit of service at his last place of abode, the court of chancery will issue a writ *de coronatore exonerando*; but the new one must be elected by the freeholders. 3 Atkyns, 184.]

[By st. 25 G. 2. c. 29. coroner convicted of extortion, wilful neglect, or misdemeanour, shall be amoved.]

Vide ante, (G 12.)

#### (G 15. a.) For taking fees not due.

So, by the st. W. 1. 10. *nul coroner reins demando, ne preign. de nulluy pur faire son office, sur paine de la greve forfeiture al roy.*

And this was in affirmance of the common law. 2 Inst. 176.

And therefore, where a coroner takes 2*s*. 6*d*. for himself, and 2*s*. for his clerk, before he will view the body, he shall be fined. 3 Inst. 149.

So, by the st. 1 H. 8. 7. he shall take nothing when any is dead by misadventure, on pain of 40*s*.

And therefore, in such case, he shall not take the fee allowed by the st. 3 H. 7. 1. 2 Inst. 176. Vide infra.

By the st. 1 H. 8. 7. justices of assise, or of the peace, may hear the offence by examination or presentment.

But a coroner may take the customary payment of 1*d*. from every town that comes to the eyre; for it is a payment due in respect of his office, and not for doing his office. 2 Inst. 176.

So, by the st. 3 H. 7. 1. he shall have 13*s*. 4*d*. on every inquisition taken on view of a body slain, out of the goods of the murderer, or if he hath none, out of the amerciamment of the township for the escape for the felon. Vide supra.

K. B. refused to compel the sessions to allow the coroner the costs of an inquisition taken on one deceased, on the ground that there was no reason for taking it. 11 East, 229.

[Vid 25 G. 2. c. 29.]

#### [(G 15. b.) For not attaching the sheriff.]

[Attachment absolute in the first instance granted against the coroners, for not attaching the sheriff, pursuant to rule of court, and directed

directed to elisors, to be named by plaintiff, and approved by the prothonotary. 2 Blk. 911. Id. 1218.]

(G 16.) Exemption.

[A coroner is exempted from serving on juries. Doug. 191.]

(H) Exaction by an officer, what shall be.

So, exaction by any officer, will be a great misprision. Vide Extortion.

If it be for taking a fee not due, or before it be due, or more than is due.

If it be by any other exaction.

And, therefore, no bond or writing may be exacted from the subject, to the king or other person, to do that, which by law he is bound to do to the king; and such bond, &c. will be void, and the defendant shall plead *dures*. 3 Inst. 149.

By the st. 1 Ed. 3. 2 sess. 15. (now expired) it was prohibited, that any of the king's council, or ministers, should exact a bond of any subject, to come in arms to the king, when sent for.

And such bond is to the dishonour of the king; for every subject ought to do the king his sovereign all service due, without compulsion. 3 Inst. 149.

If a bishop, or other ecclesiastical judge, or minister exact a bond or oath not warranted by law, the bond is void, and it will be an offence finable. 3 Inst. 149.

If the clerk of the escheator seize lands purchased by A. till a fine paid. 12 Co. 127.

If the bailiff of a wapentake omit a proclamation, which ought to be made, whereby the inhabitants of a town, not having notice, are amerced for not appearing at the wapentake. Ibid.

If a bishop constrain an archdeacon, &c. to compound with him, not to retain causes by prevention. 3 Inst. 148.

(I) Bribery, what shall be.

If an officer in a judicial office takes, of any other than the king, any fee, pension, robe, livery, gift, reward, or brocage for doing his office, or *colore officii*, except meat and drink of small value, it will be bribery, and a great misprision. 3 Inst. 145.

By the st. 20 Ed. 3. 1. justices shall be sworn, while in office, not to take fee nor robe of any but ourself, nor to take gift or reward by themselves or other, privily nor apertly, if any that hath to do before them, except meat and drink of small value, nor shall be of counsel to great or small, where we are party, &c. on pain to be at our will, body, lands and goods, &c.

And this extends to imprisonment and fine, but not to life. 3 Inst. 146.

By the st. 11 H. 4. Nu. 28. (not in print) no chancellor, treasurer, keeper of the privy seal, king's counsellor, king's surjeant, or any other officer, judge, or minister of the king, taking fees or wages of the king for their offices, shall take any gift or brocage of any, upon pain

pain to answer to the king the treble, and satisfy the party, and to be punished at the king's pleasure, and discharged from his office for ever, and any one may prosecute for the king and himself, and shall have a third part of the sum recovered. Ibid.

Extortion may be by a judicial or ministerial officer, but bribery only by a judicial officer, ecclesiastical or temporal. 3 Inst. 147.

And though the bribe is small, the misdemeanor is great. Ibid.

So, bribery may be taken *colore officii*, though no suit be depending; as, if the chancellor, treasurer, &c. make a customer, or other officer of the king, for money given; for he ought not to take any thing. 3 Inst. 148.

Or, if he take a gift, &c. in any matter referred to him by the king. Ibid.

So, if the ordinary, having power to grant administration to the widow or son of a deceased, take money to prefer the widow, or *à contra*. Ibid.

### (K) How an office shall be lost.

(K 1.) By sale within the st. 5 & 6 Ed. 6. 16.

By the st. 5 & 6 Ed. 6. 16. if any person bargain or sell any office or deputation of it, or any part of it, or take any reward or profit, directly or indirectly, or any bond, &c. for any office, &c. which concerns the administration or execution of justice, or the receipt, comptrolment, or payment of the king's treasure, &c. account, auditorship, or surveying any of the king's honours, manors, &c. or customs, or attendance in the custom-house, or the keeping of any town, castle, &c. used as a place of strength or defence, or any clerkship in any court of record, &c. he shall forfeit his right, interest, &c. in such office, deputation, or gift, or nomination to it.

And he that gives any money, reward, &c. or any bond, promise, &c. for such office, deputation, &c. shall thereupon immediately be a disabled person to have or enjoy it; and such bond, &c. shall be void.

And this statute extends to all offices, which concern the administration or execution of justice; as, the office of chancellor of a bishop; for, in matrimonial and testamentary cases, his office concerns the administration of justice, and offices in the spiritual court are within the statute, as well as offices in the courts of common law. R. 2 Cro. 269. 3 Inst. 148. 12 Co. 78.

So, the office of register or commissary. 2 Cro. 269. 3 Lev. 289. 2 Vent. 267. [Willes, 571.]

Or, surrogate. 2 Ca. Ch. 42.

So, all officers, which concern the king's revenue; as, the office of cofferer of the king's household. Co. L. 234. a. 1 Rol. 236. 3 Inst. 154.

The auditor of Wales. R. Sal. 468.

Surveyor of the customs. 2 And. 55.

To be clerk of the fines to a justice in Wales, who has power to take fines. Per Co. Goldsb. 180.

So, it will be within the statute, if a man for money, &c. surrender such an office, to the intent that the king may grant it to another. Co. L. 234. a. R. 2 And. 57. Dub. 1 Rol. 157. 236.

So,

So, if an officer make a deputation of the office to A. rendering out of it so much *per annum* to him. R. 2 Ca. Ch. 42.

Rendering a sum in gross, generally, without regard to the salary or profits. R. Sal. 468. Mod. Ca. 234. R. 2 And. 57. Vide infra.

Though the profits always amount to more than the sum reserved to be paid by the deputy. Mod. Ca. 234.

So, if the baily of the Savoy demise *bona felonum*, &c. which belong to the office, to B. and make his deputy, rendering so much *per annum*. Semb. 2 Lev. 151.

[A contract with the warden of the Fleet (who held only for life under the crown), that for a sum of money he should surrender the office to the king, to the intent that he should procure from the king a grant of the office to the purchaser, is void, though that office has been, and may be granted to a subject in fee. Willes, 241.]

So, an obligation, for performance of covenants in an indenture, will be void, though there are other covenants besides those, which relate to the sale of the office. R. 2 And. 57. 108.

If an office be void by force of the statute, the nomination belongs to the king. R. 2 Vent. 267. Vide Forfeiture, (C).

And the king cannot dispense with a person disabled by the statute to enjoy such office. 3 Inst. 154.

But the st. 5 & 6 Ed. 6. 16. does not extend to an office of inheritance, or the office of keeping any park, house, manor, garden, chase or forest.

Nor, to an office in the gift or grant of the justices of B. R. or C. B. or justices of assize.

So, an office for life or years, derived out of an office of inheritance, is not within the statute. R. 2 Lev. 151. [3 Keb. 552. 659. 678. S. C. Willes. 241.]

[This exception in the statute extends to those offices only of which subjects are seised of estates of inheritance. Ibid.]

Though the fee of the office be in the king. Ibid.

So, the sale of the office of bailiff of an hundred is not within the statute; for it is not an office of trust, nor concerns the administration of justice. 4 Leo. 33.

So, it will not be within the statute, if a deputy gives a bond to pay a moiety of the profits to his principal, for it amounts only to an allowance of the other moiety to the deputy for his trouble. R. Sal. 466. [Com. 1. S. C.]

Or, a sum in gross out of the profits; for if the profits do not amount to it, it shall not be paid. R. Sal. 468. Mod. Ca. 234. Vide supra.

Or, a less sum certain, where the salary is certain. R. Sal. 468. Mod. Ca. 234.

[A bond given by any of the officers mentioned in the statute, for securing all the profits of the office to the person appointing, is void by that statute. Willes, 571.]

[So is a bond given by such an officer to surrender whenever the person appointing chose. Ibid.]

So, by the st. 5 & 6 Ed. 6. 16. all acts, by an offender against that statute before removal from his office, shall be good.

## (K 2.) By forfeiture.

So, an office shall be lost by forfeiture: as, if he break the condition annexed to it by law, by *non user*, or *abuser*. 11 Ed. 4. 1. b. Vide Condition, (S 1, 2.)

As, if an officer of justice, as a recorder, &c. refuse attendance upon a summons, at the court. R. Sal. 435.

If the marshal of B. R. refuse or neglect to attend the court. R. 39 H. 6. 34. a.

If the serjeant at arms neglect his attendance upon the lord chancellor. Mo. 193.

If the clerk of the signet does not attend in his waiting month. 1 Sid. 81.

But non-attendance will not be a forfeiture, where he had lawful licence for his absence; as, if the king gives a licence to a serjeant at arms for not attending the chancellor, though it was only by parol. R. Mo. 193.

So, if an officer be imprisoned for a misdemeanor in his office, non-attendance during his imprisonment is no forfeiture. Semb. Cro. Car. 491.

Vide post, (K 8. 11, &c.)

## (K 3.) By misdemeanor in his office.

So, if he commits a misdemeanour contrary to the nature of his office: as, if a gaoler of a prison be guilty of extortion. R. 2 Lev. 71. Vide Condition, (S 1, 2.)

Or, suffers two voluntary escapes. R. 3 Lev. 288. Adm. Dy. 151. b. 9 Co. 96. R. 39 H. 6. 33. b.

So, *crassa negligentia* amounts to a voluntary escape; as, if he unlock his doors and go away. Cro. Car. 492.

If a searcher be absent, and has no deputy at the port, where a ship lades or unlades. R. Cro. Car. 492.

But a negligent escape is not a forfeiture of his office. 39 H. 6. 33. b. 2 Bul. 58.

Nor a single escape, though it be voluntary. 39 H. 6. 33. b.

The book says, that an escape shall not be intended voluntary, if it be not so found by verdict, or expressly confessed by the party, and that a single escape does not forfeit the office; but it does not say, that a single escape is not a forfeiture, if it was voluntary. 39 H. 6. 33, 34.

So, non-user, or abuser, of an office, by him or his deputy, forfeits the whole office. Pal. 80.

And the default of the deputy shall be charged upon the principal officer. Dy. 238. b. Semb. 3 Mod. 146.

So, if a master directs his servant, or deputy, to do an unlawful act, and he exceeds his authority, the master shall answer for him. Mo. 777.

But a tortious act of a servant, or deputy, does not affect his master, who gives authority for a lawful act only. Semb. Mo. 777. R. Mo. 787.

[The court are empowered by st. 27 Geo. 2. c. 17. to remove a person from the offices of clerk of the papers, and clerk of the day-rules in the King's Bench Prison, on account of his non-residence within the prison.

prison. In the matter of Bryant, T. 32 Geo. 3. 4 T. R. 716. H. 34 Geo. 3. 5 T. R. 509.]

(K 4.) By non-attendance upon the king in his wars.

So, by the st. 11 H. 7. 18. if any within the realm, having office or fee by the king's grant, attend not on him in person, when the king goes to his wars in person, he shall forfeit his office, &c. unless by the king's special licence or sickness, or other let, by which he could not come, duly proved, he be prevented.

And this act is perpetual, and did not determine by the death of H. 7. Dy. 211. a.

And the licence, as well as sickness, or other impediment, ought to be duly proved. Dy. 211. b.

But, by a proviso in the same statute, it does not extend to a spiritual person, the master of the rolls, or other officer or clerk of chancery, justices of either bench, barons of exchequer, or officers or clerks of those places, nor to the king's attorney, solicitor, or serjeants, nor to the clerk of the council, or any in the king's service in Berwick or Carlisle.

So, it does not extend to an officer, who had not his office by a grant of the same king, but of his predecessor. R. Dy. 211. a.

(K 5.) By acceptance of another office incompatible:—What shall be such.

So, a man shall lose his office, if he accepts another office incompatible: as, if the one office be under the controul of the other: as, if the remembrancer of the exchequer be made a baron of the exchequer. Dy. 197. b. Vide ante, (B 6.)

If a town-clerk be made mayor, or justice of peace, or alderman of the same borough. Vide Franchises, (F 27.)

(K 6.) By destruction of the thing for which the office was granted.

So, an office may be lost by destruction of the thing to which the office belongs: as, if one grants the office of parker, and afterwards destroys his park; the office, with all casual fees, is gone. R. Cro. Car. 60. Hut. 86.

If a grant be to A. to the steward of a manor, and afterwards the manor is dissolved. Cro. Car. 60. Hut. 87.

If a corporation be dissolved or surrender, the office of recorder, town-clerk, &c. is gone. Hut. 87.

But if the king, or another, grant to an officer a collateral fee, as 20*l.* *per annum* for his life for the exercise of his office; that does not determine by destruction of the thing to which the office belonged. Cro. Car. 60. Hut 87.

(K 7.) By neglect of oaths and sacrament.

So, by the st. 25 Car. 2. 2. all admitted into office, civil or military, or who shall receive a salary, fee, &c. by reason of a patent from the king, or have a place of trust under him, or by his authority, or by

authority derived from him, in England, Wales, or the navy, or Jersey or Guernsey, or admitted into service in his majesty's or royal highness's family, shall take the oaths of allegiance and supremacy the next term (the time enlarged to six calendar months after admission, or return from abroad, by 9 Geo. 2. 26.) after admittance in chancery or B. R. or at the next quarter sessions of the place where he resides, between nine and twelve in the forenoon. Vide Allegiance, (B 1, &c.) [Vide 16 G. 2. c. 30.]

And shall receive the sacrament, &c. in three months after such admittance, in some public church, on the Lord's day, &c.

And in the court where he takes the said oaths, shall deliver a certificate of receiving the sacrament under the hands of the minister and churchwarden, and make proof thereof by two witnesses on oath: and at the same time shall make and subscribe the declaration against transubstantiation.

And a person who neglects so to do, shall be *ipso facto* incapable of the office, &c. and if, after such neglect, &c. he execute the said office, being convict on information or indictment, he shall be disabled to sue in law or equity, to be guardian, executor, or administrator, to take a legacy or deed of gift, to bear office in England or Wales, and shall forfeit 500*l.* to be recovered by him that shall sue in action of debt, information, &c. in any courts of Westminster.

On tender of any person to take the oaths, the court is enjoined to administer them, and the names of the persons taking them shall be inrolled in rolls to be kept for that purpose, &c.

By the st. 13 & 14 W. 3. 6. and 1 Ann. 22. all such persons, and all ecclesiastical persons, members of the university of the foundation, being of the age of eighteen, tutors, schoolmasters and ushers, preachers in separate congregations, serjeants, barristers, advocates, &c. shall take the oath of abjuration at the times and under the penalties aforesaid. And this was confirmed by the st. 1 Geo. 13. [And extended to high constables.]

And they may take the oaths, make certificate of receiving the sacrament, &c. in C. B. or exchequer, as well as chancery, B. R. or quarter sessions.

And by the st. 1 Ann. 22. may do it at the next term or quarter sessions, though above three months after admission to the office.

An information lies for refusing to qualify himself for an office, though he be a dissenter. R. per 2 J. Eyre cont. Skin. 514.

But by the st. 25 Car. 2. 2. it is provided, that the act shall not extend to an high or petty constable, overseer, churchwarden, surveyor, or like inferior civil officer, nor to the office of a forester, park-keeper, bailiff of a manor, or the like private office.

And, therefore, not to a censor in the college of physicians.. Dub. Carth. 478.

[The common freemen of a borough are not obliged to take the test. Str. 828.]

### (K 8) Who shall take advantage of a forfeiture.

If an office be forfeited, the king, generally, shall have the advantage of the forfeiture: and therefore, where a statute makes an office void

void for any cause, the king shall have the forfeiture. 3 Lev. 290. Vide post, (K 11, &c.)

So, where the st. 5 & 6 Ed. 6. 16. says, if any bargain and sell, &c. any office, &c. he shall forfeit his right, &c. if any archdeacon of the patronage of a bishop, sell, &c. whereby the office is forfeited, the king shall grant it, and not the bishop or archdeacon. 3 Lev. 289.

But, generally, a forfeiture by an officer for life or years, derived out of an estate of inheritance of the same office, shall be lost only as to himself; and he who has the inheritance shall take the advantage. 2 Lev. 71. R. 3 Lev. 288. 39 H. 6. 34. a.

As, if a parker in fee grant the office to B. in tail for life, &c. who breaks the condition annexed in deed or by law, he who has the fee shall have the office. R. Mo. 707.

(K 9.) So, an office may become void by surrender.

So, an office may become void by surrender: as, if an officer surrender his patent in chancery. 11 Ed. 4. 1. b. Vide Patent, (G.)

So, if he surrender, in person, in court, the office of comptroller of the pipe to the chancellor of the exchequer, present in court, who grants it to another in court, all will be good without any writing, except an entry in court. Hard. 476.

But if the patent itself be not surrendered to be cancelled, nor a *vacatur* entered of the inrolment, nor an entry made of the surrender in the life of the master of the rolls; though there be an entry upon record, that it was surrendered before the master of the rolls, it is not a good surrender. R. Dy. 195. a.

So, if an officer says before a master in chancery, that he surrenders his office, who accepts it, and makes an entry, *quod tali die A. venit coram me, et sursum reddidit officium*, &c. into my hands to the use of the king; it is not sufficient, without delivery of the letters patent to be cancelled. Semb. Dy. 176.

(K 10.) By the death of the king.

So, by the common law, all patents of justices of B. R., C. B., exchequer, sheriffs, escheators, commissioners of *oyer* and *terminer*, gaol-delivery of the peace, attorney-general, determined by the death of the king.

So, since the st. 1 Ed. 6. 7. R. per all the J. 1 Eliz. 1 And. 44. Bend. 79.

But by the st. 7 & 8 W. 3. 27. s. 21. no commission, civil or military, shall determine by the death of the king, his heirs or successors; but shall continue six months after such death, unless sooner superseded, or determined by the next successor.

So, by the st. 1 Ann. 8. no patent, or grant of any office or employment, civil or military, &c.

And by the same statute, justices of assize, *oyer* and *terminer*, gaol-delivery *nisi prius*, and justices of peace may proceed, as if the late king were living, but as her majesty's justices, and in her name.

So, by that statute, no commission of delegacy, or review in causes ecclesiastical, testamentary or maritime, or any process thereon. shall be discontinued by the death of any king or queen, but may be proceeded on as if such king or queen were living.



So, by the st. 4 Ann. 8. s. 8. the privy council of the queen and her successors shall not be determined by death, &c. but shall continue to act as such six months, unless sooner determined by the next successor. [Vide 1 Geo. 2. st. 2. c. 23.]

So, the lord chancellor, or keeper, lord treasurer, lord president, lord privy seal, lord high admiral, and great officers of the household, and every other person in office, place, or employment, civil or military, in England, Ireland, Wales, Jersey, Guernsey, Alderney, Sark, or the plantations, unless sooner removed, &c.

So, by the st. 6 Ann. 7. s. 8. this is extended to the privy council, lord chancellor, and other officers, after the union.

[By the st. 1 Geo. 3. 23. the commissions of judges are continued, notwithstanding the demise of the king.]

(K 11.) By what means advantage shall be taken of a forfeiture: — By *scire facias*.

If an office be forfeited, the king may have a *scire facias*, to repeal his patent. R. Dy. 198. Vide Patent, (F 3.) Vide ante, (K 2. 8.) Vide Patent, (F 1, &c.)

And, regularly, there must be a *scire facias* to remove the party, where he has the office by matter of record; for he cannot be removed without matter of record. Dy. 198. a R. Dy. 211. a 39. H. 6. 33.

And the cause of forfeiture should be mentioned in the writ. Dy. 198. b. Vide Patent, (F 7.)

And a *scire facias* lies before inquisition, or office found of the forfeiture. Dy. 211. a.

If the *scire facias* is brought in chancery, where the patent of the office appears upon record; otherwise the forfeiture must be found by office, or otherwise. R. 3 Lev. 223. Vide Patent, (F 7.)

So, there must be a *scire facias*, though the forfeiture incurred by the st. 11 H. 7. 18.; for he may have an excuse for his non-attendance. R. Dy. 211. b.

So, there must be a *scire facias*, if it be an office for life. Sal. 466.

If a *scire facias* be brought to repeal a patent, the king cannot seize till the forfeiture be tried. R. 3 Lev. 223.

(K 12.) By inquisition or office.

So, an inquisition may be found, upon a commission out of chancery under the great seal and returnable there, of the grant of the office and the causes of forfeiture. 9 Co. 95. Bro. R. 375.

And upon such inquisition returned, the king may seize the office, without a *scire facias*. R. 9 Co. 95, 96.

If it be not an office for life. Sal. 466. Vide post, (K 14.)

And the award of seizure shall be in chancery, though he be an officer of another court. 9 Co. 98. a.

By office and award of seizure, the king shall be in possession of the office forfeited, without writ or commission for that purpose. Ibid.

But to such office, or inquisition, the party shall have his traverse or *monstrans de droit*, as the case requires. 9 Co. 98. a. Bro. R. 378. Vide Prærogative, (D 81, &c.)

And

And if the cause of forfeiture be traversed, the attorney-general may join issue upon it, which shall be tried in B. R. 9 Co. 99. a.

And after a verdict, judgment for the king. 9 Co. 100.

Or, for the officer, *quod restitatur*. 9 Co. 103. b.

So, such office or inquisition must find every thing requisite to show a title in the king to the office, otherwise it shall be quashed. 3 Lev. 288. 3 Mod. 335.

As, if the inquisition finds, that the warden of the Fleet permitted voluntary escapes, &c. without saying what estate he had in the office; for, if he had it for life, the forfeiture shall not be to the king but to him who has the inheritance. R. 3 Lev. 288. 3 Mod. 336. Sal. 469.

So, an inquisition is to entitle the king, and vest the office in him, or for information only. Sal. 469.

If it be to entitle, it must be certain. Ibid.

And cannot be supplied by a *melius inquirendum*; for that goes only where all that is necessary is not found; not where the finding is defective. Ibid.

But in an inquisition for information only there needs not so much certainty: as if an inquisition be of the forfeiture of an officer in B. R., for such inquisition is only for information; for B. R. shall determine of all forfeitures by their officers. Ibid. 2 Bul. 58.

#### (K 13.) By information.

So, upon an offence committed by an officer, which amounts to a forfeiture, an information may be exhibited against him. 2 Lev. 71. Vide Information, (B).

Or, upon an indictment found for such an offence, the attorney-general may exhibit an information against him. Dy. 151. b.

But, upon a single instance of neglect, the court does not usually grant an information. Sal. 467.

To an information, the defendant may plead not guilty.

If the defendant be convicted by confession or verdict, the office may be seised into the hands of the king, without a *scire facias*, or other process against him. Dy. 151. b.

#### (K 14.) When, without office, or *scire facias*.

So, where no freehold or interest is to be devested out of the party, or vested in the king, the king may take advantage of the forfeiture, and make a grant of the office, without inquisition or *scire facias*: as, where an archdeacon sells the office of register, contrary to the st. 5 & 6 Ed. 6. whereby his right is forfeited, and the grantee disabled to take, the king may grant the office of register to another, without office found, or *scire facias*; for the place of register was void, and the archdeacon himself disabled to supply it. R. 3 Lev. 290.

#### (K 15.) By action.

So, if any intrude into the office of another, and disturb him, who has a right to it, in the exercise of the office, there may be an assize for the *disseisin*, if he who is disturbed have the freehold. Vide Assize, (B2.)

If he have not the freehold, he may have an action upon the case. Vide Action upon the Case for Disturbance, (A 5.)

So, an action upon the case lies for disturbing him, who has a fee or

freehold: for he may have an assize, or an action upon the case, at his election. Vide Action, (M 1.)

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### (A) *Parceners by common law.*

#### (A 1.) Who are.

Parceners are by common law, or by custom. Lit. s. 241.

Parceners by common law are, where tenant in fee, or tail, dies, having several daughters, and no son; or several sisters, and no issue or brother; or several aunts, &c. the lands descend among all the daughters, sisters, aunts, &c. who make but one heir. Lit. s. 241; 242.

So, if one parcener dies, the son or other heir of the deceased shall be parcener with the survivor. Vide Co. L. 164.

If one after issue dies, by which her husband is tenant by the curtesy; the other shall be parcener with the husband, and shall have a writ of partition against him, though the husband is not a parcener. Lit. s. 264.

If one parcener disseises the other, after recovery they are parceners again. Co. L. 167. b.

So, if one recovers against the other in a *nuper obiit*, or *rationabili parte*. Ibid.

If two parceners alien, reserving a rent to them in fee; they are parceners of the rent, and not joint-tenants; for it follows the nature of the land. Co. L. 169. b.

So, if a parcener grants a rent to her sisters for equality of partition. Ibid.

But parceners cannot be otherwise than by descent: for, if several daughters, sisters, &c. purchase lands together, they are joint-tenants, and not parceners. Lit. s. 254.

(A 2.) What inheritances they take, and what not.

All lands and tenements, of which partition may be made, shall descend in parcenary.

As, a rent-charge, though it is entire. Co. L. 164. b.

A corody certain. Ibid.

A castle for habitation. Co. L. 165. a.

The lands or possessions annexed to a dignity. Ibid.

Though they be entire inheritances, which cannot be divided: as, a villein; for one may have his service for a day, or a month, &c. and afterwards the other for another day, month, &c. Co. L. 164. b.

So, an advowson, for they may present by turns. Ibid.

So, a mill; for one shall have it for so long a time, or one toll-dish, the other for a like time afterwards, or the second toll-dish. Co. L. 165. a.

But, where the public good requires that one shall have the whole, the inheritance does not go in parcenary: as, the crown descends only to the eldest daughter, sister, &c. for *regnum non est divisibile*. Ibid.

So, a castle for the defence of the realm. Ibid.

So, an office of honour, as, to be high constable of England, &c. shall be executed by the husband of the eldest daughter. Ibid.

And, before marriage it shall be executed by deputy. Ibid.

So, homage and fealty shall be done to the eldest. Co. L. 67. b. 164. b. (Semb.)

So, a dignity, or title of honour, shall not descend in parcenary; but the king may confer it on which daughter he pleases. Co. L. 165. a. 12 Co. 111.

So, where the division of an inheritance would be a prejudice to another, it goes to the eldest only, and she shall make contribution to the others; as, reasonable *estovers* appendant to a tenement; for, if all the daughters should have them, the charge would be increased. Co. L. 164. b.

So, a corody uncertain. Co. L. 164. b. 165. a.

A piscary, or common *sans nombre*. Ibid.

Yet, if the eldest cannot make contribution, there shall be an allotment made to the one for so long time, and afterwards to the other. Co. L. 165. a.

(A 3.) Incidents to parcenary. They make but one heir.

If there are several parceners, all make but one heir to their ancestor. Lit. s. 241.

And,

And, therefore, if a remainder be limited to the heirs of B., and he dies, having two daughters, they both take.

If one daughter be attainted for felony the remainder shall be void for the whole: for whoever takes by purchase, as right heir to another, ought to be complete heir, and one alone is not so; for they both make but one heir. *Semb. Co. L. 163. b.*

If B. leases, rendering 2s. rent, and if he dies, his heir within age, then 20s. If he dies having two daughters, the one within age, the other of full age, the 20s. rent is not due; for his heir was not within age, both daughters being but one heir, and one being of full age. *Co. L. 164. a.*

If one parcener enters into the whole land, generally, and takes the profits, it shall be the entry of both, and does not divest the moiety of her sister. *Co. L. 243. b. 373. b.*

Or, if both enter, and afterwards one takes all the profits; this does not divest the moiety of her sister, without an actual ouster and disseisin. *Co. L. 373. b.*

But if one enters after the death of her ancestor, claiming the whole, and takes the profits of the whole; this divests the purparty of her sister. *Co. L. 243. b. 373. b.*

So, if one enters, and makes a feoffment; this subsequent act explains the preceding entry, and shows that she was seised of the whole: yet it is not properly a disseisin, for the other never was seised; nor an abatement, for both make but one heir. *Co. L. 374. a. (Vide Co. L. 243. b.)*

[An entry by one parcener, when not adverse to his companions, enures to their benefit. 6 East, 173. 2 Smith, 295.]

[The possession of once parcener is that of the other, so as to create a seisin in the other, and carry her share by descent to her heirs. 7 T. R. 386.]

(A 4.) They have an entire freehold: — When they shall be joined in a suit.

So, parceners, till partition made between them, have but one entire freehold: and therefore, if land descends to several daughters, one *præcipe* lies against them all. *Co. L. 164. a. Vide Abatement, (F 4.)*

(A 5.) When they shall join in an action.

So, in all actions real ancestral, where the right descends to them from the same ancestor, all the parceners ought to join. *Co. L. 164. a. Vide Abatement, (E 8.)*

So, if two parceners are disseised, they shall join in an assise. *Co. L. 164. a.*

But where they sue in several rights, they ought to have several actions; as, if two parceners be disseised, and die, their heirs ought to sue severally; though after recovery they are parceners again; for each has a several right. *Ibid.*

(A 6.) In what respect each parcener has a moiety.

So, each parcener has a moiety, or several interest, in the land descended to her. *Co. L. 163. b.*

And



And therefore, if one dies, her purparty does not survive, but descends to her heir. Co. L. 164. a.

So, one may enfeof, and make livery of her part to the other. Ibid.

### (A 7.) How the descent shall be to parceners.

A descent to parceners shall be *in capita*, not *in stirpes*: and therefore, if A. hath two daughters, and one dies, and leaves three daughters, and then A. dies; the three daughters take with the aunt by descent, but the aunt shall have as much as all the daughters of her sister. Co. L. 164. a.

So, if one daughter of A. dies, leaving a son and several daughters, the son shall have all the purparty of his mother, as heir with the aunt. Ibid.

### (B) Parceners by Custom.

Parceners by custom are, where all the sons take the lands and tenements equally between them by descent: as, by the custom of gavelkind in Kent, and elsewhere. Lit. s. 265. Vide Gavelkind.

### (C) Partition.

#### (C 1.) In law.

Parceners are so called because partition lies between them. Lit. s. 241.

Partition may be made by an act in law, or in deed. Co. L. 165. b.

As, if one parcener makes a feoffment of her part, this part is thereby severed, and the feoffee does not hold in parcenary, but in common. Co. L. 167. b.

If two parceners take husbands, and after issue die, by which the husbands are tenants by the curtesy; they do not hold in parcenary; but a partition is made between them by act in law. Ibid.

So, if one parcener disseises the other, till re-entry or recovery by the disseisee, the other does not hold in parcenary. Ibid.

If the parceners are *mesne*, and one of them purchases the tenancy *paravail*, this makes a partition of the *mesnalty*: for her part shall be thereby extinguished. Ibid.

#### (C 2.) Partition in deed: — By consent.

Partition in deed shall be by consent, or by compulsion. Co. L. 165. b.

Partition by consent may be made in divers manners: as, if the parceners themselves, by agreement, divide their tenements into so many parts, as there are parceners, each part by itself in severalty, and of equal value. Lit. s. 243.

Or, if they choose friends to make partition of the tenements between them. Lit. s. 244.

Or, write the several parts in several billets, which are rolled within balls of wax, and shaken by an indifferent person; and then each takes a ball for her part. Lit. s. 246.

Or, if they determine by lot, who shall take the first ball.

So, they may make partition by consent, that one parcener shall have

have the lands for so long a time; and then the other for so long. Co. L. 167. a. 180. a.

That one shall have such a manor, or land, for a year, and the other such an one, and then that they change, and so *alternis vicibus*, to them and their heirs for ever. Co. L. 167. b.

That one shall have such an house, &c. the other such an house, and a rent for owelty of partition. Lit. s. 251. Vide post, (C 8.)

That one shall put her land in hotchpot, and then shall make partition of the whole. Lit. s. 266, &c. Vide post, (C 4.)

So, several parceners may agree, that one shall have her part in severalty, though the others hold, without making partition. Lit. s. 276.

[The customary and tenant-right estates peculiar to the north of England, are not within the statutes of partition. 3 B. & P. 378.]

### (C 3.) When the eldest shall have the preference,

If a division be made of tenements into several parts, without a special agreement who shall choose, the eldest shall make her election first, and afterwards according to their seniority. Lit. s. 244.

So, in all cases, where no agreement is made, the eldest parcener shall be preferred; as, if an advowson descends to several daughters, the eldest daughter shall have the first turn. Co. L. 166. b.

And if the privilege is given to the eldest by the law, without the act of the party, it goes to her issue: as, if an advowson descend to parceners, and the eldest dies; her heir shall present in the first turn. Ibid.

So, if she marries, or aliens, the husband or assignee shall have the same privilege. Ibid.

But, if an agreement be to the contrary, the eldest shall not have the preference. Lit. s. 244.

Or, if by assent, the eldest makes a division of the tenements into several parts. Lit. s. 245.

So, where the privilege is consequent to the act of the parties, the issue or assignee shall not have it; for it is personal: as, if partition is made by assent, or by the appointment of friends, and the eldest dies; her heir shall not choose in the first place, but the next sister. Co. L. 166. b.

So, if partition be made by the sheriff; the eldest shall not have her choice. Lit. s. 249.

### (C 4.) When a daughter shall put her part into hotchpot.

If one daughter has received land with her husband in frank-marriage in the life of her father, she shall not have any part of that which descends upon the death of her father, if she does not put the land given in frank-marriage into hotchpot with that which remains for her other sisters. Lit. s. 266, 267.

And in such case, the whole residue of the lands of the father descends to the daughters not married, till the advanced daughter puts her lands into hotchpot. Co. L. 176. b.

If the advanced daughter puts her land in frank-marriage into hotchpot, then partition shall be made; and the advanced daughter shall have

have all the land given in frank-marriage, and so much more as will make her part equal with the part of any to whom the residue descended. Co. L. 177.

So, if the donees die before the father, or before his land be put into hotchpot; the issue shall have the same advantage; and if he puts the land given in frank-marriage into hotchpot, shall have a moiety of the whole. Lit. s. 270.

But if land descends to a sister not advanced, from any other ancestor, except the donor in frank-marriage, the advanced sister shall be parcener with her without putting her land into hotchpot. Lit. s. 272.

So, if land descends in tail; for all the sisters are entitled to land in tail, *per formam doni*. Lit. s. 274. (Vide Co. L. 179. b.)

So, if any daughter has land by feoffment of her father, or any other means, except by a gift in frank-marriage, she shall be parcener with her sisters in all lands which descend, without putting the land into hotchpot, which she had from her father in his lifetime. Lit. s. 275. (Vide Co. L. 179. b.)

If a daughter, advanced in the life of her father, will put her land into hotchpot, with her sister not advanced, she cannot refuse to do it.

And if she refuses it, the advanced daughter and her husband may enter into the lands descended, and hold with her in parcenary. Co. L. 176. b.

#### (C 5.) The agreement may be by parol.

Partition by agreement between parceners may be by parol, as well as by deed. Lit. s. 250.

Though it be made of things which lie in grant; as, an advowson, rent, common, &c. Co. L. 169. a.

If they are in several counties, as well as in the same county. Ibid.

So, a rent for owelty of partition may be granted without deed. Co. L. 169. a. Lit. s. 252. Vide post, (C 8.)

So, tenants in common may make partition by parol, if they execute it in severalty by livery. Co. L. 169. a.

But joint-tenants, by the common law, if they had made partition by agreement, could not do it by parol without deed. Ibid.

Neither could they after the st. 31 H. 8. 1. and 32 H. 8. 32.; for these statutes only enable them to make partition by writ. Ibid.

Nor tenants in common, if it be not executed by livery. Ibid.

[No partition of land can now be made without deed. Willes, 248.]

#### (C 6.) By writ of partition : — Between whom it lies.

By the common law, one or more parceners might have a writ of partition against the others. Lit. s. 247.

So, if one after issue dies, by which her husband is tenant by the curtesy, the other parcener may have a writ of partition against the husband. Lit. s. 264. Vide ante, (A 1.)

So, if one aliens her part in fee, the other shall have partition against the alienee. Co. L. 175. a.

So, if one takes husband, who purchases of a second, the husband and wife shall have a writ of partition against the third parcener; because  
he

he has one part in right of his wife, though he has the other part as a stranger. Co. L. 175. a.

So, though one parcener has demised for years, yet partition lies : for the freehold continues in parcenary. Co. L. 167. a.

So, now, by the st. 31 H. 8. 1. joint-tenants, or tenants in common, of an estate of inheritance, in their own, or wives' right, may be compelled to make partition by writ *de partitione faciendâ*.

And by the st. 32 H. 8. 32. joint-tenants, or tenants in common where one or all have but an estate for life or years.

By the equity of these statutes, the alienee of a parcener shall have a writ of partition ; for he is tenant in common with the other. Co. L. 175. b.

So, may a husband, who is tenant by the curtesy to a parcener. Co. L. 175. a.

So, if a devise be to A. of lands held by knight's service, which by the st. 34 & 35 H. 8. 5. is void for a third part, the devisee shall have partition against the heir of the devisor, who claims such third part. R. Bend. 50.

But, by the common law, joint-tenants or tenants in common, could not have a writ of partition. (Vide Co. L. 175. a.)

Nor, the tenant by curtesy, or alienee of a parcener. Ibid.

So, partition does not lie between parcnere, if they have not the freehold in parcenary ; for if one makes a lease for life, a writ of partition cannot be sued ; for the writ says, *quod insimul et pro indiviso tenent*. Co. L. 167. a.

So, if one disseises the other, partition does not lie during the disseisin. Ibid.

So, a purchaser from one parcener shall not join with another, in partition, against the third parcener. Co. L. 175. b. R. Dy. 128. a. Bend. pl. 76. 210.

So, partition lies only against the tenant of the freehold. Co. L. 167. a. Vide Pleader, (3 F 1, &c.)

Except where petition is brought by tenant in common, for a term of years. Co. Ent. 419. a.

### (C 7.) How the partition shall be made.

After judgment in a writ of partition, the sheriff, by the oath of a jury, shall make a division into equal parts, and render to each parcener a part. Vide Pleader, (3 F 4.)

The sheriff may render first to the eldest or youngest, or to which he pleases. (Vide Lit. S. 249.)

But if there be land in fee, and other land in tail, he ought to render to each a part of the land in tail. Co. L. 173. a.

[By commission out of chancery. Vide Chancery (4 E). — Vide post, (C 10.)]

### (C 8.) Rent for owelty of partition : — How granted.

So, if tenements, which descend to parcnere, are the one of less value than the other, they may make partition between them, that one shall have the one tenement, and the other the other, and that she who

has the tenement of the greater value, shall grant a rent out of it to the other and her heirs for owelty of partition. Lit. s. 251.

And such rent is not a rent service, but a rent-charge. Lit. s. 253.

And may be granted by parol, without a deed. Lit. s. 252. Vide ante, (C 5).

But if it was granted out of other land, it ought to be by deed. Co. L. 169. b.

If a rent be granted for equality of partition, without saying out of what land, it shall be issuing out of the purparty of the parcener who granted it. Ibid.

If a rent be reserved, it amounts to a grant. Co. L. 170. a.

If husband and wife grant a rent for equality of partition out of the purparty of the wife, it binds for ever, if the partition was equal. Co. L. 169. b.

If a rent be granted for equality of partition, the grantee and his heirs may distrain for it of common right, into whatsoever hands the tenements out of which, &c. shall come. Lit. s. 252.

#### (C 9.) Partition, when indefeasible : — If made by writ of partition.

If a partition be made by writ *de partitione faciendâ* after the appearance of the tenant, the judgment is, *quod firma et stabilis imperpetuum teneatur*, and therefore it shall not be defeated. Co. L. 168. b. 171. a.

Though made against a *feme covert*. Co. L. 171. a.

And though it be not equal. Ibid.

So, it shall not be defeated though it is not equal, and any one of the parties is an infant. Co. L. 171. a. b.

So, by the st. 8 & 9 W. 3. 31. if made without the appearance of the tenant, if she does not appear within fifteen days after the return of the attachment, where an affidavit was made of notice to the tenant forty days before the return of the writ, and a copy of it left with the occupier of the land.

But by the same statute, if judgment be in a writ of partition, without the appearance of the defendant, upon motion showing a probable bar, or that the demandant hath not title to so much, within a year after judgment, or (if the party was an infant, *covert*, non-sane, or out of the realm) after the inability is removed, the court may order the defendant to plead, &c.

Or, if the demandant's title be admitted, but the partition appears unequal, the court may award a new partition.

[This statute applies only to cases where the tenant does not appear. 1 Bos. & Pull. 344. See 2 Bl. 1134. 1159.]

#### (C 10.) If made by commission.

So, a partition by commission out of chancery binds all of full age, if part of the land *in capite* be allotted to each; for there is a proviso in the writ to such intent. Co. L. 171. a.

So, if it be equal, though some be within age. Ibid.

But

But an unequal partition by commission does not bind any within age; for it is made *salvo jure si*, &c. Co. L. 171. a.

Vide Chancery, (4 E.)

(C 11.) If made by consent.

So, a partition of lands in fee-simple by persons of full age, sound memory, and not *covert*, by agreement between them, never shall be defeated. Co. L. 166. a.

Though the part of one be not equal in yearly value to the part of the other. Lit. s. 255. Co. L. 166. a.

So, by persons within age, if it be equal. Co. L. 171. a.

So, if a bastard *eigne* and *mulier puisne* make partition between them, the *mulier* shall be bound by it for ever. Co. L. 170. b.

So, if husbands and their wives parceners make partition, which was equal at the time of the partition; it shall not be afterwards defeated. Lit. s. 257.

Neither by the wives after the coverture determined, or by their heirs. Co. L. 171. a.

Though by surrounding or neglect, the parts afterwards become unequal. Ibid.

So, if a partition be made between husbands and their wives, not equal at the time of the partition, it shall not be defeated during the coverture. Co. L. 166. a.

Or, if such partition be between parceners, where any one is non-sane, it shall be good during the life of the person non-sane. Ibid.

So, if parceners make partition within age, and agree to it at full age, by taking all the profits of their parts, &c. it shall be good for ever. Lit. s. 258.

So, if parceners make a partition of lands in tail, which is equal, it shall not be defeated by them, or their issues. Co. L. 173. b.

So, if each part is not equal in value, it shall not be defeated during the lives of the tenants in tail. Lit. s. 255.

So, if land in fee is allotted upon a partition to one parcener and land in tail to another, it shall be good as long as both estates continue without alteration; for it is not necessary that the estates of the land are equal. Lit. s. 260.

(C 12.) When it may be defeated: — If it be not equal.

But if a partition be of lands in tail, and one part is not equal in value to the other; after the death of one, her issue may disagree to the partition. Lit. s. 255. Co. L. 166. a.

So, if a partition not equal be of lands in fee, or tail, where any parcener is within age, if she does not agree to it at her full age; she may avoid it at any time during her non-age, or afterwards. Lit. s. 258. Co. L. 166. a.

So, if such partition is made between husbands and their wives; after the coverture determine, the wife or her heir may defeat it. Co. L. 166. a. Lit. s. 256.

(C 13.) If one purparty be evicted.

So, if the purparty of one parcener be evicted by a title paramount, the partition shall be defeated; for the partition imports a warranty

and condition in law, that the one shall enter upon the other and enjoy her part in parceny, if she be evicted, as long as the privity between them continues. Lit. s. 262. (Vide Co. L. 173. b.)

Though the eviction be only of part of the purparty. Co. L. 173. b.

Or, only of an estate of freehold ; as, for life, or in tail, &c. Co. L. 174. a.

So, if all the land in fee be allotted to one, and the land in tail to another parcener, and she who has the land in fee aliens her part ; her heir may enter into the land in tail to have a recompence out of it for so much as belongs to her. Lit. s. 260.

So, if she who has the land in fee makes an estate-tail only ; for the reversion after the tail ended, is not of any account. Co. L. 173. a.

So, if she aliens only part of the land in fee, her heir may waive the residue, and enter upon the land in tail. Ibid.

Though it was not known that any part of the land was entailed ; for every one shall be intended to be conusant of her title. Co. L. 173. b.

But if the privity between the parceners be destroyed before eviction, then the parcener who was evicted shall not enter into the part of the other ; as, if after partition between A. and B. the one aliens in fee, and then the alienee is evicted ; the alienor shall not enter upon the other : for by her alienation she has dismissed herself to have any of the tenements as parcener. Lit. s. 262.

So, she shall not take advantage of a warranty in law. Co. L. 174. a.

So, if land in tail be allotted to A. and land in fee to B. who aliens, and afterwards her heir enters into the part of A., she cannot enter into the land in fee which was aliened ; for by the alienation the privity was destroyed. Co. L. 172. b.

Yet if she who had the land in fee aliens only for life, or years ; her heir shall not enter into the land in tail. Co. L. 173. a.

So, if she who had the land in tail, discontinues in fee, her issue shall not enter into the part of the other ; for he has remedy by a *formedon* for the land in tail. Ibid.

#### (C 14.) How it shall be defeated.

When a partition by a commission out of chancery is avoidable, it may be defeated by a *scire facias*. (Vide Co. L. 171. a.)

Or, by a writ of partition. Ibid.

So, if a partition be voidable for want of equality, she who would defeat it may waive assenting to her part, and enter into the part of the other. Co. L. 174. a.

And by such entry she defeats the whole partition. Ibid.

But if a parcener be evicted after partition, and would take advantage of the warranty in law annexed to the partition ; she does not defeat the whole partition, but shall have a recompence for that which she has lost. Ibid.

And she shall have a recompence for her moiety only, by which the loss will be equal. Ibid.

#### (C 15.) The effect of a partition.

Upon partition made, the occupation and descent, which before were in common, shall be several and distinct. Sav. 113.

But a co-parcener, after partition, continues in the same privity of estate

estate as before; for it does not convey, or make any alteration of the estate. Sav. 113.

And therefore, parceners shall have aid, and vouch, &c. (which are founded in privity,) after partition, as well as before. Ibid.

So, parceners shall be in from the common ancestor, as before: for the partition does not make any degree. Ibid.

So, a partition of the demesnes of a manor does not sever them from the manor, as long as the manor continues in parcenary. Ibid.

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## PARCO FRACTO.

Vide DISTRESS, (D 2.)

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## PARDON.

(A) By the king; in what cases granted: — [Herein of the effect of a pardon.] *infra*.

(B) In what, not. p. 230.

(C) How expounded. p. 230.

(D) By what words it shall be. p. 230.

(E) What offences a pardon discharges.

(E 1.) Spiritual offences, &c. p. 231.

(E 2.) A pardon of the foundation discharges all dependant. p. 231.

(F) What not. p. 232.

(G) Pardon, how granted. p. 234.

(H) How the party shall take the benefit of a pardon. p. 235.

(I) Exception in a pardon. p. 237.

(A) By the king; in what cases granted: — [Herein of the effect of a pardon.]

The king by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime, where he has hope of their amendment. St. P. C. 99. a. 3 Inst. 233. Vide Parliament, (L 46.) Vide Prærogative, (D 8.)

And therefore, in high, or petit treason, a pardon may be granted by the king alone. 3 Inst. 233.

So, in murder. R. 4 Mod. 61. Sho. 234. (Vide Sal. 499.)

In all felonies. 3 Inst. 233.

So, if a man be convicted for manslaughter, the king may pardon the burning in the hand. 3 Inst. 237.

So, though he be convicted in an appeal. H. P. C. 252. (Vide 3 Inst. 237.)

So, if convicted for heresy, or other ecclesiastical offence. 3 Inst. 238. Vide post, (E 1.)



So, the king may pardon piracy. 3 Inst. 238.

So, the king may pardon any crime or offence before attainder, or conviction. 3 Inst. 233.

The judgment against a petty jury in an attain; for though it be the suit of the party, this judgment does not give satisfaction to the party. 3 Inst. 237.

The imprisonment for two years in a judgment upon the st. W. 2. 35. Ibid.

So, all that is forfeited to the king by attainder, he may restore by his charter. 3 Inst. 233.

### (B) *In what, not.*

But by the st. 2 Ed. 3. 2. conf. by 4 Ed. 3. 13. a charter of pardon shall not be granted but in cases where a man kills another *per infortunium*, or *se defendendo*.

And by the stat. 14 Ed. 3. 15. no charter shall be henceforward granted of the death of a man, or other felony, except in case where the king may do it, saving his oath of his crown; and a charter to the contrary shall be held for none.

Yet these statutes do not restrain the king's prerogative; but they are a caution for his using it well. Semb. cont. St. P. C. 101, &c. Acc. 4 Mod. 63. Sal. 499. (Vide Sho. 284.)

And therefore, a pardon with a *non obstante* of the statute is usual. St. P. C. 101. a. Mo. 752. Kelg. 24.

So, the king cannot, by his pardon, discharge the appeal of the party. H. P. C. 251. 3 Inst. 237.

Or, a thing in which a subject has a property, or interest. Vide post, (F).

So, the king by his pardon cannot make restitution of blood, where the blood is corrupted by attainder; for it must be done by act of parliament. 3 Inst. 233.

### (C) *How expounded.*

A general pardon shall be expounded most strongly against the king, and for the benefit of the subject. 5 Co. 48. 50. a.

And therefore, where the king pardons all his subjects: an alien, residing as a friend in the kingdom, shall be pardoned; for he is a subject, though not a natural subject. Semb. Hob. 271.

But a pardon to A. of all debts, shall not be extended to a debt by A. and B. 3 Inst. 239. [So as to discharge B.]

A pardon of all trespasses, does not extend to the cutting of wood in a forest, which amounts to waste. R. Jon. 279.

[The recognizance of a person indicted for beating a custom-house officer, *in diminut. revencionum dom. regis*, was discharged on an act of grace, 7 G. though such offences are excepted. Bunb. 88.]

### (D) *By what words it shall be.*

If the king pardons treason, murder, rape, &c. it shall not be allowed, if the crime be not specified in the charter. 3 Inst. 236.

So, a commission or grant of an office, does not amount to a pardon for

for high treason; for a pardon by express words is necessary. R. 2 Rol. 50.

So, if the king pardons all felonies; this extends to petit treason, as well as murder, manslaughter, arson, burglary, robbery, rape, &c. Co. L. 391. a.

So, chance-medley, *se defendendo*, and petit larceny. Ibid.

So, a pardon of all felonies, in which treason is excepted, will be a plea to an indictment for felony against him who has committed treason. Per Coke, Poph. cont. 2 Leo. 28.

So, a pardon is sufficient, though the words are not positive: as, a pardon of outlawry, if any be, discharges him who is outlawed. 3 Inst. 238.

So, a pardon of the alienation of lands which are holden *in capite*, *ut dicitur*. 3 Inst. 239.

## (E) What offences a pardon discharges.

### (E 1.) Spiritual offences, &c.

If a suit be between party and party in the spiritual court *pro salute animæ*, or *reformatione morum*, the king's pardon, before or after the suit begins, discharges it; for the suit is for the king. R. 5 Co. 51. a. R. 2 Cro. 335. 2 Bul. 182. Cont. Cro. El. 684.

If a suit be in the Star-chamber, for a misdemeanor. 5 Co. 51. a. 3 Inst. 238.

So, where the suit is in the spiritual court, *ex officio*. R. 5 Co. 51. b. R. Cro. El. 684.

So, if a pardon be after sentence in the Star-chamber, or spiritual court, it discharges the sentence, and consequent disabilities. R. Cro. Car. 55. Adm. 2 Cro. 335.

If a suit be in the spiritual court for simony, a pardon discharges the penalty; though it does not enable to retain the benefice. R. Cro. El. 686. Mo. 916.

If a man be convicted for heresy, the king by pardon may discharge it. 3 Inst. 238.

So, if a penalty be given by statute to him who will sue for it; the king, before suit, may pardon the whole penalty. Ibid.

And the moiety, or king's part, after the suit commenced. Ibid.

### (E 2.) A pardon of the foundation discharges all dependent.

So, if the king pardons the foundation, all dependent upon it shall be pardoned: as, if a pardon be of an offence after a suit for it in the spiritual court; no costs shall be afterwards given. R. 5 Co. 51. b. 2 Rol. 299. l. 2. R. Latch, 190. Vide post, (F).

If a pardon be after an action commenced, and before judgment, the amercement shall be pardoned, though it was not due before judgment: for the delay, for which it was given, was pardoned. Co. L. 126. b. R. 5 Co. 49.

If there be a pardon of a trespass, before outlawry for it, the king's fine is pardoned. 2 Rol. (179.) l. 10.

If the contempt be pardoned, excommunication for it is discharged. 2 Rol. (178.) l. 45. Jon. 227. Cro. Car. 199.

If a bill in the Star-chamber, before pardon, be exhibited for matter within the jurisdiction of the court as to one defendant, and for a matter scandalous as to another, and after a pardon of all contempts the bill is dismissed as to the scandal with costs; the costs are discharged by the pardon. R. Hut. 79. R. Cro. Car. 68.

Though a bill depending was excepted out of the pardon: for this relates only to matter against the other defendant. R. Hut. 79.

After an indictment for a forcible entry, and restitution upon it; if the king pardons the force, the defendant cannot afterwards proceed upon a traverse to the indictment to obtain restitution. R. Yel. 99. 2 Cro. 149.

After trespass for a battery, and before judgment, if the king pardons the force, there shall be no *captiatur*. Cro. Car. 32.

If a stroke be the 1 Apr. upon which death ensues 10 Apr. and the king pardons all offences till 4 Apr. by which the stroke was pardoned; by consequence the murder shall be discharged. R. Pl. Com. 401.

If an obligation be *ad parend. mandat. ecclesiae*, a pardon of the offence and excommunication discharges the obligation. Mod. Ca. 71. 2 Lev. 36.

If the king, after verdict upon an obligation and *non est factum* pleaded, pardons all debts, and judgment be afterwards entered; yet it shall be discharged by the pardon, and the defendant may plead it. 3 Inst. 235.

A pardon of a debt discharges all suits for it; or *vice versâ*. 3 Inst. 239.

[If the felony has its commencement before the pardon takes place, but not its completion, the pardon shall operate in favour of the prisoner, as it would have done had the felony been complete before the pardon. This is the true sense of the doctrine in Cole's case. Plowd. 401 supra. Quod nota. Fost. 64.]

### (F) What not.

But a pardon of all felonies, where the party is attainted, does not discharge the attainder, or execution upon it. St. P. C. 102. b. H. P. C. 251. 3 Inst. 238.

So, a pardon of the attainder, or execution, without mention of the felony, does not pardon the felony. St. P. C. 102. b. H. P. C. 251.

Nor, shall a pardon of the felony only, when a man is abjured, discharge him without mentioning the abjuration. St. P. C. 102. b.

So, a pardon of a felony of which he stands indicted is not good, if he be not indicted. H. P. C. 251. 3 Inst. 238.

A pardon of felony, without mention of bigamy, is not good, where the felon had prayed his clergy, and it was objected that he was *bigamus*, and a writ issued to certify whether, &c. St. P. C. 102. b.

So, a pardon of several jointly of all felonies by them committed is not good; for felony is several. Ibid.

So, if it says, by them, or any of them, committed. St. P. C. 102. b.

So, a pardon of a felonious killing does not pardon murder. Ray. 13. R. Cont. 3 Mod. 37.

So, a pardon to be acquitted of the escape of prisoners discharges him of a negligent, not of a voluntary escape. St. P. C. 102. b.

So,

So, a pardon of a felony for which he was attainted, *et omnia quæ ad dominum regem pro feloniam prædictam pertinent*, without words of restitution, does not entitle him to a debt due upon an obligation: for that was vested in the king by the attainder, without office. R. 2 Rol. (178.) l. 10.

So, a pardon of an outlawry for felony, does not restore his goods or lands forfeited by the outlawry, without words of restitution. 2 Rol. (179.) l. 15. Vide infra.

So, a pardon of felony does not restore a disability by corruption of blood. Pl. Com. 557, 558.

Nor, enable him to be tenant by the curtesy, if he has not issue after, though he had before the attainder. 13 H. 7. 17. a.

[If a man gives a stroke, or poison, (which till death ensues upon it is only a misdemeanor,) and a pardon is granted of all misdemeanors, &c. but not of murder or poisoning, and afterwards the party dies, the felony is not pardoned. Fost. 64.]

A pardon to a parson of a church of all contempts, &c. after acceptance of a plurality, does not restore him to the former church. R. Jon. 339.

So, a pardon does not discharge a thing in which the subject has a property, or interest; as, if a suit be in the spiritual court for tithes, a legacy, contract or matrimony, &c. R. 5 Co. 51. a.

Or, for dilapidations. R. 3 Mod. 56.

If an incumbent, &c. accepts a plurality, the interest of the patron or king, to present, shall not be discharged by a general pardon. R. Cro. Car. 357, 358.

So, trespass lies upon the st. *de malefactoribus in parvis*, for the amends and recompence to the owner, though the king has pardoned the offence. R. Dal. 60.

So, a penalty upon a conviction for deer-stealing, is not discharged by a pardon; for it is a forfeiture to the party grieved. Semb. 1 Sal. 383, 384.

So, after an indictment for a nuisance, and a fine upon it, if there be a pardon of all offences; the nuisance may be afterwards removed: for it is annoyance to the subject. R. Sal. 458.

So, if the king pardons the judgment given against the petit jury in an attainder, the party shall have restitution; for the right of the party is not discharged by the pardon. 3 Inst. 237.

So, the king cannot by his pardon discharge a nuisance, on an indictment for it: for the suit is given to the king, for the reformation of the nuisance. Ibid.

Nor, a recognizance or obligation to the king, for surety of the peace; before the condition broken. 3 Inst. 238.

Nor, an action commenced *qui tam*, &c. upon a penal statute, except for the king's moiety or part. Ibid.

Nor, a penalty given to the party grieved. Ibid.

[Nor, penalties given between the informer and the poor of the parish. Str. 127.

Nor, a penalty for securing a duty, given in recompence of a duty taken away: as, where the st. 6 Ann. 16. gives 40s. *per annum*, for admission of every broker, and that any not admitted, &c. acting as a broker, shall forfeit 25l. The penalty shall not be discharged by  
an

an act of pardon of all offences the king may pardon. R. 2 Mod. Ca. 103, 104.

[Nor, by an act of grace. Str. 529.]

So, a pardon does not discharge a thing consequent, in which the subject has an interest vested in him: as, if costs are taxed in the spiritual court, a pardon of the offence does not discharge the costs. R. 5 Co. 51. b. R. 2 Cro. 159. Cro. Car. 199.

Though the party appeals after costs taxed, by which the sentence is suspended. R. 5 Co. 51. b.

Though costs are awarded, and not taxed; for by the award the party has an interest in them. Cro. Car. 9. Cont. 2 Rol. 304. l. 40.

So, if the party appeals after costs taxed, and then the pardon comes, and upon the appeal the former sentence is annulled, and costs given to the appellant; these costs are not discharged by the pardon: for the costs being taxed in the original suit, the party had a right of appeal, which was not taken away by the pardon; and by consequence has a right to the costs. R. Cro. Car. 47.

So, a pardon after judgment and costs taxed in the star-chamber, does not discharge the costs and damages given. 3 Inst. 238.

So, a pardon of an offence does not discharge a collateral thing subsequent to it.

So, if the king pardons an intrusion and entry, this does not discharge the profits; for he shall have account for them against the intruder, or debt against his lessee, if these actions are not pardoned. 2 Rol. (178.) R.

[So the crown's share only of a forfeiture is pardoned by an act of general pardon, but not the informers on an information filed previously. Parker, 280.]

[So, 9 G. 3. c. 37. which discharges persons who have incurred penalties, if they pay the duty before, &c. bars only future actions, but discharges not defendant against whom verdict was obtained before. 4 B. M. 2460.]

If the king pardons an outlawry, the fine to the king is not discharged. 2 Rol. (179.) l. 10.

If a man, bound in a recognizance to the peace, commits a felony; a pardon of the felony does not discharge the breach of the recognizance. 2 Rol. (179.) l. 17.

If a man be outlawed, a pardon of the outlawry does not give the goods, without words of restitution. 3 Inst. 238.

### (G) Pardon, how granted.

[A pardon ought to be under the great seal. 1 Bl. 480.]

[The method of pardoning, on the circuit, and at the Old Bailey, is this: a sign manual issues, signifying the king's intention of either an absolute or conditional pardon, and directing the justices of gaol-delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly; taking his recognizance to perform the conditions of the pardon, if any. 1 Bl. 479.]

If a man be found guilty of homicide, *se defendendo*, he shall have a pardon of right. H. P. C. 250.

For,

For, by the st. Glo. 9. *les justices assavoier au roy, et le roy luy en fra sa grace, si luy pleist.*

And therefore the justices, upon his request, let him to mainprize, and give a writ to the chancellor containing the whole record of his acquittal, upon which certificate the chancellor shall make his pardon, without speaking to the king. St. P. C. 15. (2 Inst. 316.)

But he shall not be discharged without a charter of pardon. St. P. C. 15. a.

By the st. 27 Ed. 2. st. 1, 2. in every charter of pardon, the suggestion, and the name of him who makes it, shall be comprised; and if the justices find the suggestion false, the charter shall be disallowed.

And by the st. 5 H. 4. 2. the name of him who makes the suggestion shall be specified in the pardon; and if a felon becomes a thief afterwards, he forfeits 100*l.* to the king.

But the effect of these statutes is evaded by a *non-obstante*. St. P. C. 102. a.

So, by the st. 13 R. 2 st. 2. 1. in a pardon of treason, murder, or rape, if the offence be not specified, the charter shall be disallowed. Conf. by the st. 16 R. 2. 6.

But a small or immaterial mistake, in a pardon, does not vitiate the charter; as, if it says, in consideration of service by his family *versus* the crown, where it ought to be *erga* the crown. 1 Rol. 297, 298.

If the indictment be, A. B. of C. *in com. D.*, and the pardon omits *in com. D.*, for *constat. de persona*. R. 1 Rol. 297, 298.

If the indictment be A. B. of C. knight, and the pardon be of A. B. baronet. Per three J. Holt cont. Comb. 184.

## (H) How the party shall take the benefit of a pardon.

If a pardon be by an act of parliament, in which there is no exception, the defendant shall take advantage of the pardon, without pleading St. P. C. 103. a. 3 Inst. 234. Pl. Com. 83, 84. Vide Parliament (L 46.)

And the court shall give him the benefit of the act, though he waives, or refuses it. St. P. C. 103. a.

So, he shall have the advantage without pleading, where the act says, that he shall take advantage without pleading; though there are exceptions in the statute. St. P. C. 103. a. Semb. Lane, 71.

Where the exception goes only to particular persons by name. 2 Leo. 28.

But, generally, when there are exceptions, the party ought to plead, and show that he is not a person excepted. St. P. C. 103. a. H. P. C. 252. Cro. Car. 449. Pl. Com. 103. a. 2 Leo. 28. 3 Inst. 234.

So, a special pardon shall not be intended, if it be not pleaded: as, if an entry of a judgment, where the plea was after a general pardon, be, *nil de fine quia pardonatur*; for the pardon not being pleaded, shall not be intended. R. 1 Leo. 300. Cro. El. 153.

So, if a *capitur* or *in misericordia* be entered, where the plea was after a general pardon, it is well; for perhaps there was an exception. R. Cro. El. 768. 778.

And if there be a general pardon, in which there are exceptions, the court need not take notice of it, if it be not pleaded. Lane, 71.

So,

So, if a man has a charter of pardon from the king, he ought to plead it in bar of the indictment. 1 Rol. 297.

So, he ought to plead it, showing his charter *sub pede sigilli*. St. P. C. 103. a. H. P. C. 252.

And if he pleads not guilty, he waives his pardon. R. Kelg. 25.

Yet, if a pardon be of murder and manslaughter, and he pleads not guilty to the indictment for murder, and is found guilty of manslaughter, he shall afterwards have the benefit of the pardon. Dub. Kelg. 25.

[On an indictment for returning from transportation, the king's sign manual may be given in evidence; and if not revoked, and the condition be literally, though not substantially, complied with, the prisoner shall be discharged. 2 Bl. 797.]

[Defendant in an information for maihem shall have the benefit of an act of grace, though he did not insist on it at his trial; but shall pay prosecutor full costs. 1 Wils. 214.]

So, if there be a variance in the addition, &c. between the charter and the indictment, he ought to aver that he is the same person. H. P. C. 253.

And if the pardon be between the verdict and the judgment, he may plead it, though he has not a day in court, for necessity; for he cannot have an *audita querela*, or *scire facias*, against the king. 3 Inst. 235.

So, by the st. 10 Ed. 3. 3. a man pardoned ought to find six sufficient mainpernors, before the sheriff and coroners of the county where the felony was done; and the mainprises shall be sealed with their seal, and returned into chancery; otherwise the charter shall be holden for none. But this statute is now repealed by the st. 5 & 6 W. & M. 13.

And therefore, when he pleads his pardon, he ought to have a writ of allowance, testifying that he has found sureties according to the statute. 4 Mod. 62. Ray. 13. Per Holt, Sho. 283. Sal. 499. 3 Inst. 235.

Or, he may plead the pardon, with an averment that he has found sureties, *prout patet per recordum*. 3 Inst. 335.

So, by the st. 5 & 6 W. & M. 13. which repeals the st. 10 Ed. 3. the justices, before whom a pardon of felony is pleaded, may at discretion remand the party to prison, till he enter into recognizance with two sureties, or if an infant, or covert, till they find two sureties for good behaviour for seven years.

[There has been no instance, since this statute, of the court's requiring recognizance for the good behaviour of a person pardoned for murder. Str. 1203.]

But there needs no writ of allowance, if there be a special *non-obstante*. H. P. C. 250. Cro. Car. 596, 597.

So, if he has no writ of allowance, he shall not be hanged. H. P. C. 253.

So, it is not necessary for treason. R. Cro. El. 814.

So, by the st. 10 Ed. 3. 3. if he finds surety for his good behaviour, and after mainprise does contrary to the peace, the charter shall be held for none.—(Repealed by the st. 5 & 6 W. & M. 13.)

And therefore, upon the peace broken, a *scire facias* lies to repeal the patent: and he shall be hanged for his first offence. H. P. C. 252:

So,

So, if it appears by an indictment confessed in the same court where he pleads his pardon, that he has broken the peace: the charter shall be disallowed. St. P. C. 104. a.

But where there is a special *non-obstante* of the statute in the charter, it shall be good, though the peace be broken. H. P. C. 252.

So, if a man be outlawed in an appeal, and has a pardon, he ought to sue a *scire facias* against the appellant, before allowance of the pardon. St. P. C. 104. b.

[On a pardon for a misdemeanor, the defendant shall not be put to the bar, nor plead it on his knees. Str. 816.]

## (I) Exception in a pardon.

If an offence be excepted, a corporal or pecuniary penalty, consequent to it, is also excepted. R. 5 Co. 47. a.

If an offence and fraud, in not collecting or paying the revenue, or other money to the king, be excepted; a penalty for importing prohibited goods will be excepted. Dub. 3 Mod. 241.

If accounts are excepted in an act of pardon, a sum due upon an account stated is excepted. R. 3 Lev. 135.

So, a debt for rent to the king, shall be excepted, though by negligence of the clerk it was not in charge in the exchequer. R. Cro. Car. 349.

If a bond to pay a debt, &c. be excepted, a recognizance to pay it shall be within the exception. R. Hard. 369.

If burglary be excepted, a man attainted for burglary is within the exception. 3 Inst. 234.

But where an exception goes only to the penalty or forfeiture, nothing is excepted but what is necessary for recovery of the penalty; as the prosecution: for the imprisonment and all corporal punishment are pardoned. R. 5 Co. 47. a.

If all offences in taking away, or purloining the king's goods, money, &c. are excepted, felony in purloining them will be pardoned. Hard. 367. (Cro. Car. 449.)

An exception of murder does not extend to a *felo de se*. R. 1 Lev. 8.

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## PARISH.

(A) Parish, when taken for a diocese. *infra*.

(B) Parish.

(B 1.) What shall be. p. 238.

(B 2.) What not. p. 238.

(C) Till.

(C 1.) What shall be. p. 238.

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(A) Parish, when taken for a diocese.

*Paroecia* signified antiently the precinct or diocese of the bishop. Seld de Dec. 80. [Edit. 1726. 3 vol. 1120. 2 Wils. 182.]

(B) Parish.



## (B) Parish.

## (B 1.) What shall be.

In the time of Honorius, archbishop of Canterbury, England was divided into parishes. Camb. Brit. in the Introduction. Cont. Seld. H. of T. 3 vol. 1208.

Every precinct which belongs to the same parochial church is one parish. Nom. verb. Parish.

A parish was a precinct within a diocese, which comprehended one or more villis, or a lesser territory. Seld de Dec. c. 6. s. 3. p. 80. 3 vol. 1120.

For several villis may be contained in the same parish.

And therefore, *parochia* is said to be *locus in quo populus alicujus ecclesie degit*. 5 Co. 67. a.

So, *plures hamletti potuerunt pertinere ad unam parochiam*. Fl. 4. c. 15. s. 9.

So, *plures parochie potuerunt pertinere ad unam villam*. Fl. 4. c. 15. s. 9.

## (B 2.) What not.

But if a place has not a church, churchwardens, and *sacramentalia*, it is not properly a parish.

So, it shall not be a parish by reputation within the st. 43 El. 2. if it had not a parochial chapel, chapel-wardens, and *sacramentalia*, at the time of the statute. R. Sal. 501.

Though it had a distinct overseer, and maintained its own poor. Sal. 501.

Though it had also a chapel-warden, by whom rates are collected there, and paid to another parish. Ibid.

So, land shall not be within any parish, unless by prescription, or act of parliament. Sti. 137.

So, a place, &c. may be extra-parochial.

Yet an extra-parochial place is within a county. Per Holt, Skin. 685.

## (C) Vill.

## (C 1.) What shall be.

*Villa est ex pluribus mansionibus vicinata*. Co. L. 115. b.

[A vill must consist of ten families, or have a constable, or at least the reputation of a vill. Str. 1004. 1071.]

And a vill is the genus, which comprehends several species. Co. L. 115. b.

For every borough is a vill; but not *è converso*. Ibid.

So, every parish shall be intended to be but one vill, if it does not appear to the contrary. Co. L. 125. b.

So, every place shall be intended a vill *prima facie*, if it does not appear to the contrary. Co. L. 125. b. R. 2 Cro. 263. R. Sal. 501.

And therefore, if a fine be levied of lands in A., and the parish of A. comprehends several villis, A., B., &c. nothing passes but land in the vill of A., and not land in B., or other villis within the parish of A. R. 2 Cro. 120. Vide Fine, (E 4.)

But a fine of land in the parish of A. passes land in all the villis of the same parish. R. 1 Vent. 170.

So,

So, a fine in A. which has a superintendency and constablewick, which extend over several vills, passes land in those vills. 1 Vent. 170.

If all the houses in a borough are decayed, yet it continues a vill. Co. L. 115. b.

[Where there is a constable, there there is a township. 1 T. R. 374.]

### (C 2.) What not.

But it shall not be accounted a vill where there is not, and never was a parochial church. Co. L. 115. b.

So, one vill cannot be within another vill : and therefore if, in *replevin*, the taking is supposed in a warren in A., and the defendant avows for rent out of a manor, which extends to A. and B., and the plaintiff alleges an assignment of dower out of B. ; and avers that the warren in B. was within A. This is bad ; for B., which ought to be intended a vill, cannot be within A., which ought also to be intended a vill. R. 1 Sid. 10.

[An extra-parochial place, consisting of two houses, &c. 300 acres of land worth 300*l. per annum*, belonging to and in the occupation of several persons, is not sufficient to constitute a vill. Str. 1004.]

[Nor, an extra-parochial place, a manor, formerly a nobleman's seat, and park, since converted into farms, and having five houses occupied by five tenants. Str. 1071.]

[Nor, extra-parochial place, consisting of one capital messuage, two old cottages, one new one, and one tenement, part of the capital messuage, all let to one, and inhabited by him and his under-tenants. B. M. 1391.]

[There is a piece of ground called X., within the precincts or liberties of the castle of Y. About seven years ago houses were for the first time erected upon it. The castle, with all its precincts, has always been deemed extra-parochial ; and no part of it has ever been reputed to be a vill, or treated as such. X. is no vill, and therefore not liable to the appointment of overseers. 4 M. & S. 378.]

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## PARK.

Vide CHASE, (C).

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### (A) *Its name.*

The parliament is the highest and most honourable and absolute court of justice within the realm, composed of the king and lords and commons of the realm. Co. L. 109. b. Dy. 60. a.

And is known by several names. 4 Inst. 2.

### (B) *Its antiquity.*

The parliament, *si antiquitatem spectes est antiquissima, si dignitatem est honoratissima, si jurisdictionem est capacissima.* 9 Co. Præf.

*Tempore Inæ et aliorum regum Saxonum fuerat conventus sapientum spiritualium et temporalium.* 9 Co. Præf.

### (C) *When it shall be summoned.*

By the st. st. 4 Ed. 3. 14. confirmed by 36 Ed. 3. 10. a parliament shall be holden every year once, or more often, if need be.

By the st. 16 Car. 1. 1. a parliament was to be held every third year. — But this was repealed by the st. 16 Car. 2. 1.

And by the same st. 16 Car. 2. 1. it was enacted, that parliaments shall not be intermitted, or discontinued above three years at most; but within three years after the determination of any parliament, or, if occasion, oftener, the king shall issue writs for a new parliament.

So, by the st. 1 W. & M. st. 2. 2. it was declared, as the right of the subject, that parliaments ought to be held frequently.

And, by the st. 6 W. & M. 2. a parliament shall be holden once in three years at least: and after the determination of every parliament legal writs under the great seal shall be issued for calling a new parliament.

[But now, by st. 1 Geo. 1. st. 2. 38. parliaments shall and may have continuance for seven years, and no longer, to be accounted from the day on which, by the writ of summons, the parliament shall be appointed to meet, unless sooner dissolved by his majesty.]

A writ of summons issues from chancery, by advice of the king's council, for summoning the parliament to assemble at the return of the writ. 4 Inst. 4. Vide post, (D 8. — E 1.)

But by the st. 12 Car. 2. 1. it was enacted, that the houses then sitting should be the houses of parliament, notwithstanding any want of a writ of summons or defect therein, or other defect.

So, by the st. 1 W. & M. 1.

By the st. 7 & 8 W. 3. 15. no parliament shall be dissolved by the  
R 3 demise



demise of the king, but shall immediately meet and sit for six months, unless sooner prorogued, or dissolved by the successor.

If no parliament be then in being, the last preceding parliament shall immediately convene and sit as aforesaid.

### (D) What persons compose it.

The parliament consists of the king, lords, and commons. Co. L. 109. b. Sal. 510.

Of the king and three estates of the realm, viz. the lords spiritual and temporal, and the commons. 4 Inst. 1. Ha. Parl. 1.

Of the king and two estates. By the king at a parliament, 18 Jac. Rush. 21.

But it is not necessary that the lords spiritual or temporal should always assent to every act; for if all the lords spiritual are absent, an act by assent of the king, the other lords, and commons, will be good. Vide post, (G 10. — R 3.)

So, if all the lords temporal are absent. Vide post, (R 3.)

So, if the lords spiritual are present, and all dissent. Ibid.

The lords and commons anciently sat together. 4 Inst. 2. 2 Bul. 173. Cont. Præf. Cot. Abr. 5. Vide post, (E 2.)

All the lords ought to be summoned. 4 Inst. 1. 4.

And all the knights for shires, citizens and burgesses ought to be elected, which are 493. 4 Inst. 1.

And by the st. 5 Ann. 8. at the union, 16 peers and 45 commoners are added for Scotland.

### (D 1) The king.

The king is *caput parliamenti*. 4 Inst. 3. Ha. Parl. 1. in marg.

### (D 2.) The lords spiritual.

The lords spiritual, viz. the archbishops and bishops sit in parliament by reason of their baronies; for they hold their bishoprics *per baroniam*. 4 Inst. 1. 45.

And they ought to be summoned *ex debito justitiæ*. 4 Inst. 1.

The summons to the lords spiritual names them by their Christian name, and their name of dignity. 4 Inst. 5.

But an addition of the surname does not vitiate the writ. Ibid.

A bishop elect may be summoned as a lord of parliament. 4 Inst. 47.

A summons to an abbot or prior named him by his dignity only. 4 Inst. 5.

An abbot, &c. though summoned, needed not to have come to parliament, unless he held *per baroniam*; for he was dead in law. 4 Inst. 44, 45.

So though he had often served in parliament. 4 Inst. 45.

And where the king granted to such an one to be a lord spiritual of parliament, it was void. Ibid.

### (D 3.) The lords temporal.

Every duke, marquis, earl, viscount, and baron of England, by creation or descent, ought to be summoned to parliament *ex debito justitiæ*. 4 Inst. 1.

If

If he be of full age. 4 Inst. 1.

A summons to a temporal baron mentions his Christian name, and his dignity. 4 Inst. 5.

If he be a knight, that is frequently added. Ibid.

And if his surname be added it does not vitiate the writ. Ibid.

If a knight or esquire be summoned by writ to parliament, he cannot refuse. 4 Inst. 44.

#### (D 4.) The commons.

The commons make the third estate of parliament, and consist of knights of shires, citizens, and burgesses. 4 Inst. 1.

And all ought to be elected by writ *ex debito justitiæ*. Ibid.

And they represent all the commons of the realm. Ibid.

The beginning of the commons' attendance in parliament seems to have been since the 40th year of H. 3. Cot. Abr. Præf. 11, 12.

The first writ for the election of knights, citizens, and burgesses, seems to have been in the 49 H. 3. Cot. Abr. Præf. 13. b.

#### (D 5.) Knights of shires.

A writ goes to the sheriff of every county in England and Wales, commanding, *quod duos milites gladiis cinctos magis idoneos et discretos comitatûs tui, &c. eligi fac.*, &c. Co. L. 109. b. 6 Inst. 6.

Anno 49 H. 3. a writ of summons was directed to the sheriff of every county, *quod venire fac. duos de legalioribus et discretior. militibus singulorum comitatuum*. Dug. Sum. Parl. 3 Cot. Abr. Præf. 13. b.

And from that time, the counties of Bedford, Berks, Bucks, Cambridge, Kent, Cornwall, Cumberland, Derby, Devon, Dorset, York, Essex, Gloucester, Hereford, Hertford, Huntingdon, Lancaster, Leicester, Lincoln, Middlesex, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland, Salop, Somerset, Southampton, Stafford, Suffolk, Surry, Sussex, Warwick, Westmorland, Wilts, and Worcester, have sent each of them two knights.

By the st. 27 H. 8. 26. s. 29. every county in Wales shall send one knight to parliament.

By the stat. 34 & 35 H. 8. 13. the county palatine of Chester henceforth shall have two knights, to be elected by process from the chancellor of England, to the chamberlain of Chester, his lieutenant or deputy.

By the st. 25 Car. 2. 9. the county palatine of Durham shall have two knights in parliament, to be chosen on a writ from the chancellor &c. to the bishop of Durham, or his temporal chancellor.

#### (D 6.) Citizens.

A writ to the sheriff of every county commands, *quod de qualibet civitate comitatûs tui duos cives*, &c. 4 Inst. 6. Co. L. 109. b.

Anno 49 H. 3. a writ of summons was directed to the citizens of York, and required them to send to parliament 2 *de discretioribus, legalioribus, et prioribus civibus*, &c. Dug. Sum. Parl. 3.

Citizens and burgesses were not afterwards summoned with the knights of shires to parliament, till 23 Ed. 1.; but the king sent them commissioners, who assessed or levied upon them the same, or a greater tax than was granted by the knights of shires. Bra. Treat. de Burig.

25—32. Dugdalc mentions the second summons, 22 Ed. 1. Dug. Sum. Parl. 7.

### (D 7.) Burgesses.

A writ to the sheriff of every county commands, *quod de quolibet burgo duos burgenses de discretioribus et magis sufficientibus*, &c. 1 Inst. 110.

So, it was done *anno* 49 H. 3. Dug. Sum. Parl. 3. A writ was directed to the burgesses of every borough.

Burgesses were not afterwards summoned to parliament till 22 or 23 Ed. 1. Bra. Treat. de Burg. 25, &c. Dug. Sum. Parl. 7.

By the st. 27 H. 8. 26. s. 29. the counties of Brecknock, Denbigh, and every shire in Wales shall send to parliament one knight; and every shire town (except Merioneth) one burgess.

### (D 8.) Election: — Writ of election.

The writ for summons, or election, shall have no material alteration, or addition, without act of parliament. 4 Inst. 10.

By the st. 7 & 8 W. 3. 25. there shall be forty days between the *teste* and return of the writ of summons.

And the lord chancellor, &c. shall issue writs for the election with as much expedition as may be.

And as well on calling a new, as on a vacancy in parliament, the writs shall be delivered to the proper officer, to whom the execution of them belongs, and no other.

Before the writ of summons issues, the king gives a warrant to the chancellor, by bill signed, for issuing the writs. Vide D'Ewes, 2.

The form of the warrant. Ibid.

If the person elected dies, or makes election for another place, the speaker issues a warrant to the clerk of the crown, upon motion, to make a writ for another election at the vacant place. 29 Nov. 1710.

So, if the person elected accepts an office, he made a peer, &c. Ibid.

Though there be a petition depending for the election at the same place, if it be not against him who dies, &c. 30 Nov. 1710.

Or, there was not any candidate, but the persons who are returned. Ibid.

The writ of summons shall be, *teste* the king.

Or, *teste* the chief justice, or guardian of the realm. 4 Inst. 6.

[By stat. 10 G. 3. c. 41. the speaker, during recess of parliament, may issue his warrant to the clerk of the crown, to make out a writ for electing a member in the room of one dead during recess, on the death being certified under the hands of two members. He must give notice in the Gazette, and not issue warrant till fourteen days after; nor unless the return of the deceased member was brought in fifteen days before the end of the session preceding his death.]

[But the speaker is not to issue his warrant for a new election, unless the death was certified, so that notice may be given fourteen days before the meeting of parliament, nor where a petition was depending at the last prorogation or adjournment. St. 15 G. 3. c. 37. s. 1.]

[He may issue his warrant on a member's becoming a peer, in the same manner as if he were dead. s. 2.]

[Messenger of great seal to carry writs to sheriffs of London and Middlesex, and all other writs to post-master general. 53 G. 3. c. 89.]

(D 9.) Who

(D 9.) Who cannot be elected, and who may.

A man attainted for treason or felony, cannot be elected; for the writ says, *magis idoneos et discretos eligi fac.* &c. 4 Inst. 47, 48.

So, *temp.* H. 7. persons outlawed for treason could not come into parliament, till their attainders were reversed. R. Bac. H. 7. 13.

Nor, persons outlawed after judgment, or before, in a civil action. R. per all the J. 1 And. 293.

Nor, persons taken in execution upon a judgment. Mo. 57.

An alien cannot be elected to parliament, or, if he be elected, shall not sit. 4 Inst. 47.

Nor, a denizen. Ibid.

But a man, when naturalized, may. Ibid.

A clergyman cannot be elected; for he is represented in convocation. 4 Inst. 47. Mo. 783. [Vide 41 G. 3. c. 63.]

[Vide 41 G. 3 c. 63.]

Though he be of the inferior order. 4 Inst. 47.

By the st. 46. Ed. 3. No. 13. a man of the law, following business in the king's court, and sheriffs, shall not be elected for counties. Cot. Abr. Pref. 7. Vide infra.

A judge of B. R. or C. B., or a baron of the exchequer, cannot be elected; for they are assistants to the peers. 4 Inst. 47. *Tamen* Thorp, a baron of the exchequer, was speaker to the commons. 31 H. 6.

By the st. 5 & 6 W. & M. 7. sess. 2. no member of the house of commons shall be, directly or indirectly, concerned in farming, collecting, or managing of duties given by lottery, or other act, except commissioners of the treasury, officers of the customs or excise, and commissioners of the land-tax.

[Vice treasurer for Ireland, and commissioners of the treasury, may sit in parliament.]

But he may be a member of the corporation erected by the st. 5 & 6 W. & M. 14. sess. 2.

He may have a judicial place in the duchy court, or other court, ecclesiastical or civil. 4 Inst. 47.

By the st. 12 & 13 W. 3. 2. after limitation in the house of Hanover, no person in an office or place of profit under the king, or who receives a pension from the crown, shall be capable of serving as a member of the house of commons; but by the st. 4 & 5 Ann. 8. this was repealed.

By the st. 4 & 5 Ann. 8. no person, who, in his own name, or in trust, hath any new office or place of profit under the crown, then after created, no commissioner, sub-commissioner, secretary, or receiver of the prizes, comptroller of the accounts of the army, commissioner of transports, sick and wounded, for wine licences, nor agent for any regiment, nor governor, or deputy-governor of the plantations, nor commissioner of the navy for the out-ports, nor any having a pension from the crown during pleasure, shall be capable of being elected a member of the house of commons. [The election is declared void, and he shall not sit or vote, on pain of 500*l.*]

Nor, by the st. 6 Ann. 7. after the Union.

And by that statute, all disabled to sit in the parliament of England shall be disabled in the parliament of Great Britain.

Nor,

Nor, by the stat. 1 Geo. 56. any person, having a pension from the crown for a term of years in his own name, or in trust.

[Members in the navy or army not to vacate upon accepting new commissions. 42 G. 3. c. 90. s. 172.]

[No judge of session, justiciary or exchequer in Scotland, is capable of being chosen a member of the house of commons. 7 G. 2. c. 16.]

By stat. 15 G. 2. c. 22. commissioners of revenue in Ireland, of the navy, clerks in the following offices: treasury, auditors, tellers, or chancellor of exchequer's offices, admiralty, paymaster of army or navy, secretaries of state, salt, stamps, appeals, wine-licence, hackney-coaches, hawkers and pedlars, or having office in Minorca or Gibraltar, (except commission-officers in regiments,) are excluded from being members of the house of commons.

[Vide 41 G. 3. c. 52. 42 G. 3. c. 89. 116. 46 G. 3. c. 80. 141. 50 G. 3. c. 65. 57 G. 3. c. 62, 63. 66. 84.]

[By 22 G. 3. c. 45. every person who shall directly or indirectly, by himself or by any other to his use, hold any contract made with the commissioners of the treasury, navy or victualling-office, or the master-general or board of ordnance, or any other person, for or on account of the public service; or shall in pursuance of any such contract, furnish any money to be remitted abroad, or any wares, or merchandize to be used in the service of the public, shall be incapable of being elected or sitting or voting in the house of commons, during the time that he shall hold such contract.]

By the st. 9 Ann. 5. no person shall be capable, &c. who shall not have a freehold or copyhold for his own life, or a greater estate in law or equity, and for his own use, of the annual value of 600*l*. if a knight; 300*l*. if a burgess, &c. in England, [Wales or Berwick,] above reprises and all incumbrances that may affect the same. [Provided, not to extend to the eldest son of a peer, or of a person qualified to serve as knight of a shire.]

An infant, within the age of 21 years, cannot be elected. 4 Inst. 47.

And by the st. 7 & 8 W. 3. 25. the election of an infant is void, and if being returned he sit, he shall incur the penalty, as if he sat without being returned.

By the st. 4 & 5 Ann. 8. confirmed after the union by the st. 6 Ann. 7. if any accept any office of profit from the crown, while a member, his election shall be void, but he may be capable of being again elected.

By the st. 1 H. 5. 1. knights, &c. shall not be chosen, unless resident within the shire the day of the date of the writ of summons. By the st. 8. H. 6. 7. unless dwelling and resident.

And by the st. 1 H. 5. 1. citizens and burgesses chosen shall be resident, dwelling, and free in the city or borough, and no other.

By the st. 28 H. 6. 14. knights of shires shall be notable knights of the same county, or such notable esquires and gentlemen born of the same county, as shall be able to be knights, and not any of the degree of yeoman.

By the st. 5 El. 1. none shall enter into the parliament house till he hath taken the oath of supremacy, 1 El. before the lord steward or deputy.

Nor, by the st. 30 Car. 2. 1 sess. 2. after the speaker chosen, till he take

take the oaths of allegiance and supremacy, and subscribe and repeat the declaration against popery, between nine in the morning and four in the afternoon, at the table in the middle of the house in a full house, in such order as the house is called over, on pain of 500*l.*, and being a popish recusant convict, and incapable of office, &c. Vide post, (E 4.)

Nor, by the st. 7 & 8 W. & M. 27. till at the time he takes the oaths, and subscribes the declaration in the st. 1 W. & M. 8. he also subscribe the association.

But by the st. 1 Ann. sess. 1. 22., the association is taken away.

Nor, by the st. 13 & 14 W. 3. 6. and 1 Ann. sess. 1. 22., till he take and subscribe the abjuration-oath.

By the st. 7 W. 3. 4. any person, who after the *teste*, or the ordering of any writ, or after the vacancy, by himself or others, or by any means, before his election, gives to any voter, or to any county, city, town, &c. in general, any money, meat, drink, or present, &c. is disabled to serve upon such election.

Treating a corporation on the day of election, is a breach of this statute. R. in the case of Sloan at Thetford, 26 Jan. 1699.

But all others, under the degree of a peer of the realm, may be elected. 4 Inst. 47.

As, a banneret. Ibid.

The heir apparent of a peer. Vide supra.

So, he who is judge in the duchy or other court. 4 Inst. 47.

And the attorney or solicitor-general. 4 Inst. 48. cont.

Every one professing or practising the common law, though there was an ordinance of the peers in parliament. 46 Ed. 3. cont. 4 Inst. 38. Vide supra.

A mayor or bailiff of a corporation. Cont. Bro. 38 H. 8. Tit. Parl. 7. Acc. 4 Inst. 48.

A sheriff of one county may be elected in another; as, 1 Car. the sheriff of Buckinghamshire was elected in Norfolk. 4 Inst. 48.

And the king by his charter cannot exempt a man from being elected; for such charter of exemption is void. 4 Inst. 49.

[By stat. 33 G. 2. c. 20. members, before they vote or sit in parliament, shall deliver in a schedule of their qualifications according to 9 Ann. and swear to it; except eldest sons of peers, or of persons qualified to be knights of a shire, members for universities, or Scotch members.]

[Stat. 14 G. 3. c. 58. repeals stat. 1 H. 5. and so much of the 8th, 10th, and 23d H. 6., as relates to the residence of electors or elected.]

[By 41 G. 3. c. 52., the acts respecting the British and Irish parliaments, are to be applicable to the Imperial parliaments.]

### (D 10.) Who shall be electors, who not.

By the st. 1 H. 5. 1. choosers of knights, &c. shall be resident within the shire the day of the date of the writ of summons.

By the st. 8 H. 6. 7. shall be dwelling and resident, &c.

By the st. 8 H. 6. 7. every one of the electors shall have lands or tenements of the value of 40*s.* *per ann.* at least above charges; and the sheriff shall have power to examine on the Evangelists, how much he may expend by the year.

By

By the st. 10 H. 6. 2. he shall have 40s. *per ann.* freehold in the same county.

By the st. 7 & 8 W. 3. 25. before he polls, if required by any candidate, he shall swear he hath in that county freehold lands or hereditaments of 40s. *per ann.* and hath not polled before : and for perjury or subornation, be subject to the penalties of the st. 5 El. [Vide in the st. 18 G. 2. 18. the oath altered and enlarged.]

By the st. 7 & 8 W. 3. 34. a quaker, instead of an oath in the usual form, shall be permitted to make affirmation in all courts and places, &c. — But the preamble speaks of cases, where process issues for contempt. — Vide the st. 10 Ann. 23. [By which the affirmation is to be admitted upon elections.]

If a man has a freehold in ancient demesne, he may elect. Semb. cont. 4 Inst. 4, 5.

By the st. 7 & 8 W. 3. 25. none shall vote by reason of any trust or mortgage, unless in the actual possession or receipt of the profits ; but a mortgagor, or *cestuique trust* in possession, shall vote.

By the same statute, conveyances of any messuage, lands, &c. in any county, borough, &c. to multiply votes, are void ; and but one single voice shall be admitted for one house or tenement.

By the st. 10 Ann. 23. such a conveyance, on condition, &c. shall be absolute ; and he who executes, or, being privy to such purpose, prepares it, or votes by virtue of it for a knight of the shire, forfeits 40l.

[By 13 G. 2. c. 20. the stat. 10 Ann. c. 23. and 12 Ann. stat. 1. c. 5. for preventing fraudulent conveyances, and persons voting who have not been in possession of 40s. are extended to freeholders in towns that are counties of themselves.]

By the st. 7 & 8 W. 3. 25. none under the age of twenty-one shall be admitted to give a vote, &c.

By the st. 5 & 6 W. & M. 20. s. 48. no officer in the excise shall persuade or dissuade any to vote, &c. on pain of 100l., a moiety to the poor, a moiety to the informer, and of incapacity to enjoy any office of excise or trust.

No peer hath a right to vote at elections. R. nem. con. 14 Dec. 1699. R. nem. con. 13 Feb. 1700. R. 24 Oct. 1702.

If a peer, or lord lieutenant of a county, concerns himself in elections, it is an infringement of the liberties of the commons. R. nem. con. 15 Feb. 1700. R. 24 Oct. 1702.

By the st. 7 & 8 W. 3. 27. none refusing the oaths in the stat. 1 W. & M. 8. or, being a quaker, the declaration of fidelity in the st. 1 W. & M. 18. which the sheriff or chief officer, &c. at the request of any candidate may administer, shall vote, &c.

Nor, by the st. 6 Ann. 23. refusing the oath of abjuration, or, if a quaker, to declare the effect thereof.

If a man, who has a right to vote for two, gives a single vote, he cannot afterwards give a second vote for another. R. in a committee : but the consideration of it postponed by the house. 21 Dec. 1699.

By the st. 23. H. 6. 15. citizens and burgesses have always been chosen by citizens and burgesses, and no other.

And, by the same statute, the precept to cities and boroughs shall be, to choose by citizens of the same city citizens, and if a borough, by burgesses of the same.

And,

And, by common right, in all boroughs, the election ought to be by all the burgesses, where there is no prescription, or constant usage time out of mind, &c. to the contrary. R. 8 May, 1626. Vide Brady, Tr. 60.

And, therefore, if the king grant to a borough by charter, that a select number shall elect, &c. this does not take away the right of the other burgesses. 4 Inst. 48.

So, a bye-law by the corporation itself, that a select number shall elect, does not avail. Ibid.

In a borough which has no charter, or burgesses, nor any custom for it, the election shall be by all the householders, and not by freeholders only. R. 21 May, 22 Jac. Vide Brady, 60, &c.

But, by an original grant, or custom, an election may be by a select number. R. 4 Inst. 49.

So, by custom or prescription, it may be by burgage tenants. Vide post, (D 12.)

[By st. 18 G. 2. c. 18. every elector, if required, shall swear that he has a freehold of 40s. *per annum*, and what and where, and has had it a year, or come to it by descent, marriage, marriage-settlement, devise, or promotion; that it was not granted on purpose to qualify; his place of abode; that he is twenty-one, and has not polled before.]

[Vide 19 G. 2. c. 28.]

[By s. 3 & 4 of 18 G. 2. c. 18. elector must have been assessed to the land-tax within twelve months before, (except for chambers, &c. not usually assessed,) and duplicates of assessment shall be kept among the records of quarter-sessions.]

[Vide 19 G. 2. c. 28. 42 G. 3. c. 116.]

[By s. 5. of 18 G. 2. c. 18. person not qualified voting, or voting more than once, forfeits 40l.]

[By s. 6. taxes and rates are not to be deemed charges within the meaning of this act.]

[St. 19 G. 2. c. 28. regulates the elections of cities and towns, which are counties in themselves.]

[By st. 31 G. 2. c. 14. persons holding their estates by copy of court-roll, are not thereby entitled to vote for counties; if they vote, they forfeit 50l. to any candidate for whom they did not vote.]

[By st. 3. G. 3. c. 15. a freeman shall not vote, unless admitted twelve months before first day of election, except entitled to freedom by birth, marriage, or servitude.]

[The mayor and common council of the borough of Carmarthen have power to admit to the freedom of the borough such of the inhabitants paying scot and lot, who for three years previously have rented lands within the borough, for which they paid 10l. a-year: the defendant, an inhabitant of that description, was nominated a burgess accordingly (by which title the corporators are called); and it was holden, that a burgess so appointed is within the prohibition of this act against occasional freemen voting at elections; and that the defendant having voted within the twelve months after he was sworn in, was liable to the penalty of 100l. imposed by the act, although he had been nominated to be a burgess for more than six years before. 8 T.R. 246.]

[Stat. 3 G. 3. c. 24. requires annuities to be registered with the clerk of the peace, twelve months before the first day of election.]

[Officers



[Officers of the revenue prohibited to vote. 22 G. 3. c. 41.]

[By 2 G. 2. c. 24. every freeholder, &c. claiming to have a right to vote or be polled at an election, shall, if required by either of the candidates, or any two of the electors, make an oath or affirmation, that he has not by himself, or any person in trust for him, received, directly or indirectly, any sum or sums of money, office, place, or employment, gift or reward, or any promise or security, &c. in order to give his vote at the election.]

[Bribery by loan is but colour, and is really bribery by gift. 1 Bl. 317.]

[By s. 7. persons taking money or reward for their vote shall forfeit 500*l.* and be disabled to vote at any future election; provided, s. 11., the prosecution be commenced within two years.]

[Since this statute B. R. will be cautious of granting informations at common law, till the time of limitation be expired: yet still they will on circumstances grant such an information, to prevent collusion with a common informer, and that the offence may be prosecuted at the suit of the king for the public benefit. 1 Bl. 384.]

[The action need not state all the parties for whom the bribe was given, nor is it necessary to prove that those parties were candidates. 1 Bl. 523. Andr. 248.]

[Neither is it necessary that the person bribed should give his vote according to the bribe. Andr. 317.]

[By s. 8. offenders, who within twelve months after the election, shall discover others so that they be convicted, shall be discharged from all penalties, if they themselves have not been before convicted.]

[On this clause making an affidavit is a sufficient affidavit to indemnify the discoverer: but a conviction must follow; and a naked verdict only, without a judgment, is not a sufficient conviction. 1 Bl. 665, 666.]

[And it will be good, though the discoverer himself be found guilty of bribery between the discovery and conviction. Ibid.]

[But whether the discoverer may be relieved, after verdict against him, by motion, or must be driven to his *audita querela*, will depend on the discretion of the court, according to the circumstances of his case. Ibid. et 3 Wils. 35.]

[Bribery at parliamentary elections is still punishable as an offence at common law. 3 Burr. 1335. 1 Bl. 380.]

[An action for bribery will lie, though the party bribed does not vote according to the bribe. 3 Burr. 1234. 1 Blk. 317.]

[If there has been wilful delay in proceedings on the bribery-act, the defendant should move the court to stay proceedings, and cannot object to the trial: since whether there has been wilful delay or not, depends on the practice of the court in which the suit is commenced, upon which the court alone can determine. 3 T. R. 5.]

[If proceedings in an action on the bribery-act, staid, under the 11th section, on the ground of a wilful delay, the rule of court for staying them cannot be put upon the record, and so the plaintiff cannot bring error thereon. 3 T. R. 9.]

[A verdict, without a judgment, is not a conviction within 2 G. 2. c. 24. s. 7.]

[The

[The bribery-act 2 G. 2. c. 24. s. 11. provides, that no person shall be made liable to any penalty, &c. unless prosecution be commenced within two years after such penalty, &c. shall be incurred; or, in case of a prosecution, the same be carried on without wilful delay. The 9th G. 2. c. 38. explaining this provision, only applies to that part of it which relates to commencing the suit, defining what shall be considered a commencement; and does not take away the privilege reserved to the party prosecuted, by the latter part of the proviso. 3 T. R. 5.]

[It is not necessary to state that the party for whom the bribe was given was a candidate. 3 Burr. 1586. 1 Blk. 523.]

[It is not necessary to state (or if stated to prove) all the parties for whom the bribe was given. 3 Burr. 1586. 1 Blk. 523.]

[It is not necessary to state the voter's right of voting. 3 Burr. 1586. 1 Blk. 523.]

[In pleading, facts may be detailed according to their legal effect. Therefore, in declaring on the bribery-act, 2 Geo. 2. c. 24. the precept sent by the sheriff to the portreeve of a borough, need not be set out. 1 T. R. 235.]

[No damages are recoverable for detention of the debt in an action for bribery. 4 Burr. 2489.]

[Offender discovering bribery may insist on this defence under *nil debet*. Id. 2464. 2471.]

[In an action upon the statute for bribing a person to give his vote at an election of members of parliament, it need not be proved that the person bribed had a right to vote. 2 Wils. 395.]

[The time of delivering the precept to the returning officer need not be proved in an action against a third person for bribery at an election. 4 Burr. 2273.]

[The bribery-act does not make a plaintiff the discoverer. 4 Burr. 2504. Id. 2464. Vide 4 Burr. 2283. 1 Blk. 665.]

[A case in which the court refused to interfere on motion, on behalf of a defendant convicted on the bribery-act, on the ground of his having convicted another by his evidence. 3 Wils. 35.]

[If the plaintiff in an action on the bribery-act, 2 Geo. 2. c. 24. s. 11. do not proceed to trial for 6 years after issue joined, this unexplained will be accounted a wilful delay, within the 11th section, when, after verdict in his favour, the court will stay the proceedings, without allowing him the costs of the trial. And this, though the defendant has not applied so early as he might, provided he applies before judgment. 3 T. R. 5.]

[A motion to stay proceedings on the bribery-act, for a wilful delay, is an application, not to the favour, but to the justice of the court. 3 T. R. 5.]

As to the determination of the right of elections, vide post, (E 15. —F 3.)

### (D 11.) The manner of election : — In a county.

By the st. 7 H. 4. 15. at the next county-court after delivery of the writ, proclamation shall be made in full county of the day and place of parliament, and all present duly summoned, or others, shall then in full

full county proceed to election, freely and indifferently. *Vide ante*, (D 10.)

By the st. 23 H. 6. 15. the election shall be made in full county between eight and eleven in the forenoon.

But it is sufficient, if the election be begun within those hours. 4 Inst. 48.

By the st. 7 & 8 W. 3. 25. the sheriff shall proceed to an election at the next county-court after the receipt of the writ, unless it be held on the day of such receipt, or in six days after: for then he may adjourn the court to some convenient day, giving ten days' notice of the time and place.

And, by the same statute, the sheriff shall hold the county-court for an election at the most public place, where it hath been most usually for forty years past. *Vide infra*.

And the county-court for the county of York, formerly held on a Monday, shall be held on a Wednesday.

But the sheriff of Southampton, at the request of any candidate, may adjourn from Winchester, after all are polled, to the Isle of Wight.

It may be judged, who are elected, by hearing of the voices, or view of the hands held up. Pl. Com. 123. 126. a.

But if the freeholders demand a poll, the sheriff ought not to refuse it; for, upon view, he cannot judge who have freeholds. 4 Inst. 48.

And he ought not to refuse it, though the party waves it. *Ibid*.

So, if the party demand a poll, he ought not to refuse it. *Ibid*.

And now by the st. 7 & 8 W. 3. 25. if the election be not determined upon view, with consent of the freeholders, but a poll is demanded, the sheriff, with others deputed by him, shall forthwith proceed to take the poll, in some open place by the sheriff appointed.

[Poll, when to commence. 25 G. 3. c. 84.]

And the sheriff, or his deputies, shall appoint such a number of clerks as he thinks meet, for taking of it, who shall take the same in the presence of the sheriff, &c. and shall be first sworn by the sheriff, &c. to take the same truly and indifferently, and to set down the name of each freeholder, and the place of his freehold, and for whom he polls, and to poll none, unless sworn, if any of the candidates require it.

[Oath of returning officer. 2 G. 2. c. 24.]

[Oath of poll clerk. 25 G. 3. c. 84.]

[Oaths at elections. 18 G. 2. c. 18. 19 G. 2. c. 28. 25 G. 3. c. 84.]

[Mode of administering oaths. 34 G. 3. c. 73. 42 G. 3. c. 62.]

And the sheriff, &c. shall appoint such one person as each candidate shall name, to inspect the clerk appointed for the taking the poll.

And the sheriff, &c. shall proceed to poll all the freeholders, and not adjourn the court without consent of the candidates to any other place, nor, by unnecessary adjournments in the same place, protract or delay the election, but proceed in taking the poll from day to day, and time to time, without other adjournment, unless by consent of the candidates, till all the freeholders present be polled, and no longer.

[Duration of the poll. 25 G. 3. c. 84.]

And the sheriff, mayor, &c. shall deliver to any who desires it a copy of the poll, paying only for the charge of writing it; and shall

forfeit 500*l.* to the party grieved for every wilful offence against this act.

[Vide 25 G. 3. c. 84., 19 G. 2. c. 28., 33 G. 3. c. 64., as to the place, time, and mode of election.]

[By 8 G. 2. c. 30., military to be removed before elections.]

[By 10 Ann. c. 23. the sheriff must deliver the check-books, as well as the original poll-book to the clerk of the peace. Str. 1048.]

[By stat. 18 G. 2. c. 18. s. 7, 8, 9. booths for taking the poll not exceeding fifteen, to be erected at candidates' expence, with the names of the hundreds on them. Clerks to be appointed. A list of the towns for which each booth is appointed shall be made, and, on request delivered to each candidate; and no person to vote there, but whose estate lies in one of these towns, unless they do not lie in any place mentioned in any of the lists. And a check-book to be allowed for each candidate.]

[By s. 10 & 11. the sheriff shall not adjourn the next county-court after receiving the writ for more than sixteen days, and it may be adjourned to a Monday, Friday, or Saturday, notwithstanding st. 6 G. 2. c. 23.]

[Warrant of speaker upon the death, or promotion to the peerage, of a member. 24 G. 3. c. 26.]

[The 51 Geo. 3. c. 126. imposes a duty upon the returning officer of providing a convenient booth, or place for holding the election of members of parliament; and it directs that this shall be done at the expence of the candidate. A person is nominated and elected by a city as their representative, without any knowledge or concurrence, or interference on his part. He takes his seat in parliament. Held, that he was not a candidate within the meaning of the statute, and therefore not liable for the hustings. Candidate means a volunteer. 2 M. & S. 212.]

[Under st. 51 Geo. 3. c. 126. election candidates for Westminster are only liable each for a moiety of the expense of the hustings. 1 M. & S. 283.]

[The returning officer, at an election to serve in parliament, is not liable to an action for refusing a vote, without proof of malice. 1 East, 563.]

[The punishments imposed by 18 Geo. 2. c. 18. are cumulative with those under 5 Eliz. c. 9. s. 6. & 2. Geo. 2. c. 25. s. 2. 6 East, 223.]

[The power of directing the costs of a vexatious petition to be taxed under 28 Geo. 3. c. 52., and granting a certificate thereon, is not confined to the then speaker when the report was made. 11 East, 194.]

[The speaker may grant a new certificate for costs, under 28 Geo. 3. c. 52. if the former certificate or certificates were null. 11 East, 194.]

[Two several petitions were presented against the return of a member for G. which, being referred to a committee, were pronounced each frivolous. Held, that the costs could not be taxed jointly under 28 Geo. 3. c. 52. 3 Smith, 560. 7 East, 507.]

[It is a rule, that the enacting clause of an act of parliament, shall not be restrained by the preamble. Thus: three several statutes previous to 28 Geo. 3. c. 52. give costs of certain specified cases of petitions

tions against elections. That statute, in its preamble, recites the three former acts, and that it is expedient that provision should be made for discouraging persons from presenting frivolous and vexatious petitions, &c. "in any of the cases to which the above recited acts relate." In s. 19. it enacts, that whenever the committee shall report, &c. the the party or parties "who shall have appeared before the committee in opposition to such petition," shall be entitled to costs. The terms of enactment take in many cases not included in the former acts. Held, that full effect should be given to them, notwithstanding the preamble. 4 M. & S. 234.]

(D 12.) In a city or borough.

By the st. 23 H. 6. 15. the sheriff, after delivery of the writ, shall deliver, without fraud, a sufficient precept under his seal to the mayor or bailiffs of cities and boroughs within his county, reciting such writ, and commanding them, if a city, to choose citizens, if a borough, burgesses for the parliament. Vide ante, (D 10.)

And a sheriff doing contrary to this or other statutes about elections, shall forfeit the penalty of the st. 8 H. 6. 7. viz. 100*l.* to the king, and a year's imprisonment without bail; and shall forfeit 100*l.* to every knight, citizen, or burgess chosen in his county, and not duly returned.

By the st. 7 & 8 W. 3. 25. the officer forthwith, on receipt of the writ, shall make out the precept to each borough, &c. and in three days after receipt, by himself or proper agent, deliver it to the proper officer, &c. to whom the execution of it belongs, and no other.

[The precept for a borough must be directed to the returning officer; if other words are added, they are surplusage, and may be struck out; and parol evidence shall not be received to show they had been there, and so to make variance from the declaration and the record erroneous. 4 B. M. 2267.]

And by the same statute, such officer shall indorse on the precept the day of his receipt in the presence of him who delivers it, and forthwith give public notice of the time and place of election, and proceed to election thereupon within eight days after receipt of the precept, giving four days' notice of the day of election.

[The indorsement of the returning officer of the time of his receiving the precept is immaterial, and need not be proved on an action for bribery against a third person. 4 B. M. 2273.]

A citizen is the most worthy; but his election agrees in all respects with the election of a burgess. Per Holt, Mod. Ca. 51.

The election in a borough is by persons, who hold by burgage-tenure, or by the burgesses of a corporation. Ibid.

The right of a vote for electing burgesses to parliament is incident to every burgage-tenure. Ibid.

The election by the burgesses of a corporation is a personal privilege given by prescription or charter, and is a right, vested in the whole corporation, to be exercised by every member of the same corporation. Per Holt, Mod. Ca. 52.

By the st. 1 W. & M. 2 sess. 2. and the st. 2 W. & M. 7. it is declared, that elections to parliament ought to be free.

(D 13.)

(D 13.) The return of the elected.

By the st. 7 H. 4. 15. after the election, the names of the persons chosen (whether present or absent) shall be written in an indenture under the seals of the choosers, and tacked to the writ; which indenture, so sealed and tacked, shall be holden for the sheriffs return to the said writ for the knights of the shires; and this clause shall be added to the writ, *et electionem tuam in pleno comitatu tuo factum distincte et aperte sub sigillo tuo et sigillis eorum qui electioni illi interfuerunt nobis in cancellaria ad diem et locum in brevi contentum certifies indilate.*

By the st. 23 H. 6. 15. the mayor or bailiffs, &c. shall return to the sheriff the precept they received by indenture between the sheriff and them of the elections, and the names of the citizens and burgesses by them chosen. And the sheriff shall make rightful return of his writ, and of every return to him made by any mayor or bailiffs.

And if the sheriff do contrary to this, or any other statute for elections, &c. he shall incur the pain inflicted by the st. 8 H. 6. 7. viz. 100*l.* to the king, and imprisonment for one year, without bail or mainprize, and forfeit 100*l.* to every knight, citizen, or burgess chosen in his county, and not duly returned.

By the st. 5 R. 2. sess. 2. c. 4. if a sheriff be negligent in making his return, or leave out of his return any city or borough, bound or of old wont to come to parliament, he shall be amerced, or otherwise punished as was accustomed in times past.

If any sheriff refuses the return of the proper officer, and accepts a return by an improper officer of the corporation, it shall be amended by the clerk of the crown, by order of the house to file the proper return, and take the other off the file. 20 Dec. 1710.

If he makes a double return, and one is waived and appears improper, it shall be amended by taking it off the file. 8 Dec. 1710.

Vide post, (D 14.)

(D 14.) At what time it shall be.

By the st. 5 R. 2. 4. if a sheriff be negligent in making his return, he shall be amerced or punished as was accustomed in times past.

By the st. 7 H. 4. 15. and the clause afterwards inserted, the sheriff is commanded, *quod electionem, &c. ad diem et locum in brevi contentum nobis in cancellaria certifies.*

And where a sheriff did not make a return in due time, he was taken into custody by order of the house, as for a breach of privilege. 23 Oct. 1702.

By the st. 10 & 11 W. 3. 7. if a sheriff make not a return on or before the parliament is to meet, or in convenient time, not exceeding fourteen days after election on a new writ, he shall forfeit 500*l.*, a moiety to the king, a moiety to the informer.

(D 15.) False return.

By the st. 11 H. 4. 1. justices of assise may inquire of returns made to writs of parliament, and if found by inquest, that the return is con-

trary to the st. 7 H. 4. 15. the sheriff shall incur 100*l.* to the king, and the knight, unduly returned, shall lose his wages.

And the sheriff also, by the st. 8 H. 6. 7. shall have a year's imprisonment without bail.

But by the st. 6 H. 6. 4. the sheriff or knight, &c. may traverse such inquest of office, before the justices of assise.

By the st. 23 H. 6. 15. if any sheriff make a return contrary to that, or other statute for elections, &c. he shall incur the penalty of the st. 8 H. 6. 7. ante, (D 12.), and also pay to every person chosen and not duly returned 100*l.* to be recovered with costs in debt against the sheriff, his executors or administrators, by the party grieved, if he sue in three months after the beginning of the parliament; or, in his default, by any that will sue.

And if any mayor or bailiffs return to the sheriff any not duly chosen, he shall forfeit 40*l.* to the king, and 40*l.* to every person chosen and not returned, to be recovered *ut supra*.

And if any returned be put out, and another put in his place, he that is put in his place, if he take upon himself to be knight, citizen, or burgess, forfeits 100*l.* to the king, and 100*l.* to him put out to be recovered, &c.

By the st. 7 & 8 W. 3. 7. continued by the st. 12 & 13 W. 3. 5. and afterwards by the st. 12 Ann. sess. 1. c. 15. made perpetual, a false return is against law, and any making or procuring it, may be sued by the party grieved, who shall recover double damages with costs.

All contracts, securities, bonds, &c. to procure a return are void, and he who makes them forfeits 300*l.*, a third to the king, a third to the poor, and a third to the informer; and a return, contrary to the last determination in the house of commons of the right of election for the same place, is a false return.

By the same statute, the clerk of the crown shall enter the return in a book, (which, or a copy of it, shall be evidence as much as a record,) and the not entering it in six days, or if he alter it, but by order of the house of commons, or give a certificate of any not returned, or wilfully neglect his duty, he shall forfeit 500*l.* and his office, and be for ever incapable of it.

By the same statute, any officer who wilfully, maliciously, and falsely returns more persons than he ought, forfeits double damages, with costs of suit to the party grieved, who may sue the officer, or him who procures such return, at his election. *Vide infra*.

The house expects the sheriff to make a return according to law, and will not give him directions in case of difficulty; though the mayor to whom the precept was directed dies; and yet the burgesses go to election, and part return one by one indenture, and the other part return another by another indenture. 9 Jan. 1699.

If a sheriff makes a false return, debt lies for the 100*l.* upon the st. 23 H. 6. 15. R. Pl. Com. 118. 130. Ast. Ent. 72. 91.

So, an action upon the case lies for a false return, after a determination for him in parliament. Semb. Lut. 89. Sal. 502. Semb. cont. Sal. 505.

Or,

Or, after the determination there becomes impossible; as, if the parliament be dissolved. Semb. per Holt, Sal. 503.

So, an action lies upon the st. 7 & 8 W. 3. 7. for a false return. Lut. 185.

If the plaintiff makes his case pursuant to the statute. Sal. 504.

But an action does not lie for a false return, if it be not founded upon some statute; for it is a matter only cognizable in parliament. Semb. Sal. 505. Vide Action upon the Case, (B 8.)

And therefore, an action upon the case does not lie before the determination in parliament. R. Lut. 89. Per Holt, Sal. 503.

Nor, after a determination, by him against whom the determination there was. R. Lut. 89. Sal. 503.

Nor, since the st. 7 & 8 W. 3. 7. where the return was conformable to the last determination of the house of commons. Semb. Lut. 189.

So, it does not lie by the common law for a double return. Cont. per three J. in B. R., but the judgment was reversed in the exchequer and the reversal affirmed in parl. R. 2 Vent. 37. 2 Lev. 114. Pol. 470. R. 3. Lev. 29. Per Holt, Sal. 503.

[Double damages may be recovered for any false return, though there is no resolution of the house of commons relating to the right of election to that place. 1 Wils. 125. Willes, 597. S. C.]

[Action at common law will lie for a false or for a double return; for there is *damnum cum injuria* in both cases. D. per Willes. C. J. Ibid.]

[The courts of Westminster-hall are not bound by resolutions of the house of commons relating to actions at common law for such returns; and the party may proceed there, notwithstanding the order of the house. D. per Willes C. J. Ibid.]

[The st. of William is a remedial act, and the *venire facias* may be *de corpore comitatus*. Ibid.]

By the st. 7 & 8 W. 3. 25. no sheriff or under-sheriff in a county or city, or mayor or other officer in a borough, &c. shall give or take any fee or gratuity, for making out receipt, delivery, return, or execution of any writ or precept for elections.

#### (D 16.) The wages.

A knight for a shire had 4s. *per diem* for his expences *veniendo ad parliamentum, ibidem morando, et exinde redeundo*. 4 Inst. 46.

A citizen and burgess 2s. *per diem*. Ibid.

If nothing is done, but by the death of the king the parliament is dissolved, *qu. whether wages are due?* Ibid.

And by the st. 23 H. 6. 10. at the next county court after the delivery of the writ, the sheriff shall make proclamation, that the coroners, every chief constable, and the bailiffs of every hundred, shall be at the next county court to assess the wages of the knights, and all else that will come may, but the sheriff, coroners and bailiffs not coming, forfeit 40s. each; and then the sheriff or under-sheriff, in full county, shall assess a certain sum on every hundred assessable, so as the sum on all the hundreds exceed not the sum due to such knights, and shall assess a certain sum on every village assessable in each hundred, so as the sum on all the villages in each hundred exceed not the sum on such hundred. And if the sheriff levy more on any place than assessed, or assess otherwise, he shall forfeit 20l. to the king,



and 10*l.* to him that will sue by *scire facias* against the sheriff on this statute, to be paid, if on such *scire facias* he make default, or be convict, with treble damages.

By the st. 12 R. 2. 12. lords, or spiritual persons, purchasing lands contributory to the wages of knights, they shall continue contributory, as they were wont.

By the st. 23 H. 6. 10. the expences of knights shall not be levied of any villages, whereof it was not levied heretofore.

Tenants in antient demesne were not contributory to those expences. Cot. Ab. 1.

Nor, clerks of chancery, having benefices. Ibid.

Nor, tenants of the bishop of London. Ibid.

### (D 17.) Privilege.

A member of parliament shall have privilege for himself his servants and goods. 4 Inst. 24. D'Ew. 43. 66. Dy. 60. a. in marg. Vide Privilege.

And therefore, he shall not be arrested or sued. D'Ew. 43.

[Vide 10 G. 3. c. 50.]

So, his attendants shall not be arrested. D'Ew. 83, 84, 85. 629.

Nor, shall be served with a *subpœna*, citation, or other process, though he be not restrained. 4 Inst. 24. D'Ew. 655. H. Parl. 29.

[But now see 10 G. 3. c. 50.]

A *supersedeas* goes for every action in particular, and not for all actions generally. Latch, 150. Dy. 60. a. in marg. Seld. 3 vol. 2 P. 1524.

And a *supersedeas* goes to justices of assize, *quod supersedeant captioni assisarum, &c. ubi comites, et alii summoniti ad parliamentum sunt partes quamdiu parliamentum duraverit.* 4 Inst. 24.

He shall not be assaulted; for the assailant was taken into custody. 1 Dec. 1699.

Nor, his servant. D'Ew. 656. 658.

By the st. 5 H. 4. 6. and 11 H. 6. 11. if any assault, or affray be made to a lord, knight, citizen, or burgess come to parliament, or other council of the king, by his command, proclamation shall be made three days that he yield himself in B. R. within a quarter of a year after, or the first day of the term after such quarter, and if not, that he be attaint, and pay double damages to the party, to be assessed by inquest, or by the justices of B. R., and pay a fine and ransom: and if he do, and be found guilty by inquest, the same penalty.

The privilege of freedom from arrest for their persons, goods, and attendants, is demanded by the speaker, when he is confirmed by the king. 21 Jac. Rush. 119.

And if a member be arrested, he may have a writ of privilege for his discharge. Dy. 60. a.

But a letter from the speaker, for allowance of privilege, is not to be regarded. R. Latch, 48. 150. Dy. 60. in marg.

It is no breach of privilege to file an original against him. Sal. 512.

[A member of parliament may be sued in C. B. by bill. Str. 734. Ld. Raym. 1442.]

[If a person having privilege be in the King's Bench prison, a declaration may be filed against him as being in the custody of the marshal, and no summons need be issued against him. 5 T. R. 361.]

If a servant of a member be arrested, he need not have a writ of privilege, but shall be discharged by the serjeant. D'Ew. 249, 250.

But if a servant procure himself to be arrested, he shall be punished for the contempt. D'Ew. 254. 258.

And if he procure himself to be a servant to avoid his debts, he shall have no privilege. D'Ew. 373.

So, if he be not a menial servant he shall have no privilege. D'Ew. 315. 655.

[An attorney, though a menial servant of a peer, has no privilege of parliament. Str. 1065.]

[Whether a game-keeper is entitled to privilege? *qu.* But if he is, it is necessary to have affidavit what and where the manor is, that the lord is in possession, and that the defendant is game-keeper. 1 Wils. 278.]

[Order of lords, 28th June 1715, does not extend to all their servants, only such as are necessarily and properly employed about their estates or their persons. Ibid.]

[So, C. B. declared that privilege extended to infamous and seditious libels tending to inflame the minds and alienate the affections of the people from his majesty, and to excite them to traitorous insurrections against the government. 2 Wils. 151.]

[But, by resolution of. house of lords 29th November 1763, and of house of commons, 24th November 1763, writing and publishing seditious libels is not entitled to privilege.]

And a servant may be sued, if he be not arrested. Semb. 1 Mod. 146.

Privilege shall be allowed in all cases, except treason, felony, or the peace. 4 Inst. 25. Cott. Abr. Pref. 8. b.

So, a peer shall have privilege, if cited in the ecclesiastical court. Seld. 3 vol. 2 P. 1478.

So, a peer shall have privilege, though he be not committed in time of parliament, except for treason, felony, or refusing surety of the peace. R. 2 Car. Rush. 365. H. Parl. 30.

Nor, shall he be taken by attachment out of chancery. D'Ew. 203.

[The court of B. R. will not grant an attachment against a peer for not paying a sum of money awarded, though the defendant consent on condition that the attachment shall lie in the office for a certain time. 7 T. R. 172.]

[Nor, against a member of parliament. 7 T. R. 448.]

[A Scotch peer (not one of sixteen) arrested, shall be discharged on motion. It does not appear whether the suit was also discharged. Fort. 165.]

So, privilege shall be allowed in an action by the king. H. Parl. 16

Or, an information. H. Parl. 30.

The privilege of a peer commences from the *teste* of the summons, and continues for twenty days after the session, and so for twenty days before and twenty days after every session, upon prorogation. R. by the Lords, 28 May 1624, and 27 Jan. 1628. 2 Lev. 72. 1 Keb. 329.

But the commons claim forty days before and after every session. 2 Lev. 72.

[On the dissolution of parliament, the members have privilege *re-deundo* for a reasonable time. Fort. 159. Str. 985. B. R. H. 28.]

[If a member is arrested within that reasonable time, it is breach of privilege. *Ibid.*]

[A member so arrested may be discharged without a writ of privilege, on motion. *Ibid.* and *Fort.* 342.]

[But it is on filing common bail; for it is a discharge to his person not to the suit. *Ibid.*]

But no member shall have privilege, when he is only a trustee. *R.* 13 Feb. 1700. 16 Nov. 1699. *R.* 24 Oct. 1702.

Nor, shall he have privilege unless for his person, when the house does not actually sit for dispatch of business. Declared as a standing order, *nem. con.* 13 Feb. 1700.

Nor, shall he have privilege when he is a public officer, for a thing done in the execution of his office. *R.* 28 Nov. 1699.

Nor, shall he have privilege, if taken in execution. *Vide post*, (D 20.)

Nor, if taken after his election, and before the session begins.

Or, if taken before his election, he shall not have it afterwards. *R.* in *Parl.* 12 Mar. 1592. *Mo.* 340.

And by the st. 12 & 13 W. 3. 3. all persons may sue or proceed in any suit in the courts at Westminster, admiralty, court of arches, prerogative court of Canterbury and York, and delegates in causes matrimonial and testamentary, and all courts of appeal, against any peer, or member, or their servants, immediately from the dissolution, prorogation, or adjournment for more than fourteen days till the time of meeting or re-assembling, so as they arrest not the person privileged, but proceed by summons and distress infinite, or by original bill, summons, and distress infinite, till common bail fined, &c.

So, by the st. 11 G. 2. 24. in any court of record, Wales, or county palatine.

And by the st. 12 & 13 W. 3. 3. none staid by privilege, shall be barred by the statute of limitations.

And by the same statute, no original debtor or accountant to the king shall have privilege but from arrest.

Nor, shall a member have his privilege, when he has once waived it. 20 Nov. 1702.

[Waiver of privilege must be in writing. *B. R. H.* 37.]

[It is never as to the person, only to give a power of suing. *Ibid.*]

Or, if he begins at law, he shall not have privilege, upon a bill in equity to be aided against such suit. 1 *Ver.* 329.

[If a peer, plaintiff, gives rule to examine witnesses, it is not breach of privilege in defendant to examine. 2 *Vesey*, 298.]

[If peer brings action at law, it is not breach of privilege in defendant to bring bill for injunction. *Ibid.*]

[Peers may be sued in *B. R.* by original bill. *Say*, 63. *Cowp.* 844. 2 *H. Bl.* 267. 299.]

The privileges, liberties, and jurisdiction of parliament are the right and inheritance of the subject. By the Commons, 19 *Jac.* *Rush.* 53.

But none shall be imprisoned by the serjeant for breach of privilege till the matter be examined by a committee, and reported to the house. *R.* 13 Feb. 1700.

[The lords have privilege from arrest, &c. as well as the commons. *Seld.* 3 vol. 2 *P.* 1478.]

[No

[No peer has privilege of peerage or of parliament against being compelled by process of courts of Westminster-hall to pay obedience to *habeas corpus* directed to him. Order, 7th February 1757, 8th June 1757.]

They shall not answer to a complaint against them in the house of commons. Seld. 3 vol. 2 P. 1478.

[The statute 4 G. 3. c. 24. has converted what was before a privilege, into a legal right; and under that statute members of parliament are entitled to frank letters.]

[A Roman Catholic peer is not entitled to frank. 2 Bos. & Pull. 139.]

[The statutes 24 G. 3. sess. 2. c. 37., and 35 G. 3. c. 53. regulate the number and weight of letters to be franked.]

[By stat. 4 G. 3. c. 33. the creditor of a member, a merchant, may on affidavit sue out writ and serve him, and if he does not make satisfaction in two months, he shall be bankrupt from the time of service.]

[Merchant committing act of bankruptcy, creditors may sue out commission, and commissioners proceed, notwithstanding privilege.]

[But the person shall not be arrested or imprisoned except for cases made felony by the bankrupt acts.]

[By stat. 10 G. 3. c. 50. peers and members may be sued at any time, and the suit shall not be impeached or stayed by privilege; but the person not to be imprisoned.]

[The court may order the issues from time to time to be sold, and plaintiff's costs to be paid, and the residue retained till the purpose of the writ answered, and then the issues or money returned.]

[Rule of court of B. R., C. B., or exchequer, may be enforced by distress infinite.]

[If member is illegally taken, and detained by process of B. R., and is brought by *habeas corpus* to be charged in execution in C. B., they will remand him, that he may be discharged by B. R. Barnes, 199.]

#### (D 18.) Assistants in parliament.

All the judges of the realm, and barons of the exchequer of the coif shall be attendant and assistant *in domo superiori parliamenti*. 4 Inst. 4. 50.

So, the masters of chancery. 4 Inst. 4.

So, the attorney and solicitor-general.

And the king's council. 4 Inst. 4.

But the presence of the judges, &c. is only for their advice, not for their consent. Seld. 3 vol. 2 P. 1650. 4 Inst. 4.

#### (D 19.) Proxies.

A commoner cannot have any proxy. 4 Inst. 12. for he himself is elected. Ha. Parl. 11.

But a lord in parliament may have his proxy. 4 Inst. 12.

And such proxy shall be a lord of parliament. Ibid.

And this is the constant course since 1 H. 8. Seld. 3 vol. 2 P. 1477.

Yet, anciently, a bishop made a proctor of the clergy his proxy. 4 Inst. 12.

And others not barons. Seld. 3 vol. 2 P. 1477.

And

And the usual course is, for a temporal lord to make a temporal lord his proxy, and for a lord spiritual to make a spiritual lord. Seld. 3 vol. 2 P. 1477.

A lord may name two or three for his proxies; as, 1 El. 4 Inst. 12. Vide *infra*, the order, 2 Car.

So, two or three *conjunctim et divisim*. 4 Inst. 12. Seld. 3 vol. 2 P. 1477.

And in such case, all present ought to assent or dissent; for if one be content and the two others not content, it is no vote. R. 4 Inst. 13. Ha. Parl. 11.

But he shall not have above two proxies. By order, 2 Car. Rush. 269.

The proxy is appointed by the lord upon leave for his absence.

And it has usage for it, *à tempore* Ed. 1. Seld. 3 vol. 2 P. 1476.

But he may be summoned with a clause, that he do not make a proxy. Ibid.

If a lord appears in parliament, though he speaks or argues nothing, his proxy is thereby revoked. R. 1 El. 4 Inst. 13. Ha. Parl. 11.

### (D 20.) Absents.

By the st. 5 R. 2. 4. if any summoned to parliament, viz. lord, knight, citizen, or burgess, absent himself without cause, he shall be amerced and otherwise punished as hath been antiently used: that is to say, a lord by the peers; a knight, citizen, or burgess, by the commons. 4 Inst. 43.

By the st. 6 H. 8. 16. none shall depart from the house of commons without licence of the speaker and commons, entered in the book of the clerk, before the end of the parliament, on pain to lose his wages.

And he who departs may be fined by the commons. 4 Inst. 44. D'Ew. 309.

So, a lord may be fined by the lords. 4 Inst. 44.

So, an information lies for a contempt. Semb. H. Parl. 17, 18.

But, a burgess being ill, cannot be discharged for it. Cont. Bro. Parl. 7. 4 Inst. 8. acc. R. acc. D'Ew. 244. 281. 307.

Nor, a member detained in execution. D'Ew. 244. 2 Ed. 4. 8. a. Per Dy. Mo. 57. and if he be, by the st. 1 Jac. 13. he may be taken in execution again.

Or, absent upon an embassy. D'Ew. 244.

Yet, if a member, absent for illness, request his discharge, or his distemper be incurable, he may be discharged, and another elected in his stead. D'Ew. 337. 429.

### (E 1.) Parliament summoned; and the beginning of it.

The writ of summons to parliament issues at least forty days before the beginning of a parliament. 4 Inst. 6. Vide *ante*, (C—D 8.)

The parliament cannot begin without the presence of the king, either in person or by representation. 4 Inst. 6.

The king is often present in person.

Or, if the king be out of the realm, there may be a special commission to the *capitalis justiciarius* of the realm, to hold and proceed in the parliament. 4 Inst. 6. Vide Roy, (H 1, 2.)

And if the *custos* of the realm be engaged, &c. there may be a commission to hold it in the name of the king, or himself. Cott. Ab. 19.

So,

So, if the king be infirm, a commission shall issue to certain lords of parliament, to hold &c. the parliament. 4 Inst. 6.

So, it was 19 Jac. Rush. 33. Ha. Parl. 3.

So, if a parliament begins by the king in person, it may, after prorogation by the king, be summoned before commissioners. 4 Inst. 7.

If the king pleases that the parliament shall not begin at the day of the return of the writ summons, a writ patent under the great seal tested before the day of the return, and directed *prælati, magnatibus, proceribus hujus regni, ac militibus, civibus, et burgensibus*, &c. shall be read at the day of the return in the upper house before the lords, and other commons there assembled, whereby the parliament shall be prorogued to another day. 4 Inst. 7.

So, it was 1 & 5 El. Vide post, (M.)

And in such case the parliament does not begin till the day to which it is prorogued. 4 Inst. 7.

[The courts are bound to take notice of the commencements, prorogations, and sessions of parliament. 1 Lev. 296. cited Doug. 97 n.

And that even when the proceedings are on a private statute. Ibid.

### (E 2.) In what place assembled.

Antiently both houses of parliament sat together. 4 Inst. 2. 2 Inst. 267.

But it appears *cont. per Prynne* in his pref. Cot. Ab. 5.

As in 4 Ed. 1. 2 Inst. 267.

Anno 50 Ed. 3. the house of commons assembled in the chapter-house of the abbot of Westminster. Cot. Abr. pref. 13. b. 4 Inst. 2.

The place was antiently St. Stephen's chapel.

Every day before the house of commons assembles, prayers are said in the house by the speaker's chaplain.

So, upon solemn days, as 30 Jan. 29 May, 5 Nov. &c. some divine is desired to preach a sermon before the house. 3 Jan. 1710.

But none shall be recommended to preach before the house unless he be of the dignity of a dean, or of a doctor in divinity. R. 31 Jan. 1699.

### (E 3.) Things done at the beginning of a parliament: — In the house of lords. [Et vide post, (E 4.)]

At the first day of the parliament, the king sets forth the causes of summoning the parliament. 4 Inst. 7.

Or, the chancellor or keeper for him. Ibid.

Or another; though the chancellor be present; as, the chief justice. 4 Inst. 8.

The king's chamberlain, &c. 4 Inst. 8. and marg. imb.

When the commons go to choose their speaker, the lords appoint four justices, and two masters in chancery, to be receivers of petitions for England, Ireland, Wales, and Scotland, which shall be delivered within six days ensuing. 4 Inst. 11.

And three justices and two masters are appointed receivers of petitions for Gascoign, Guien, Poitiers, Normandy, Anjou, &c. which shall be delivered within six days ensuing. Ibid.

Then six of the temporal and two of the spiritual nobility are appointed triers of the petitions of England, Ireland, Wales, and Scotland

land, who, or four of whom, assisted by the king's counsel, sit in the treasury chamber, and try whether the petitions are reasonable to be proposed to the lords. *Ibid.*

As many are appointed triers of the petition of Gascoign, &c. *Ibid.*

And this course still continues, though Gascoign, &c. are lost. *Ibid.*

#### (E 4.) In the house of commons.

By the st. 5 El. 1. every knight, citizen, burgess, and baron of the cinque ports, before he enters into the parliament-house, or has a voice there, shall take the oath of supremacy, (and by the st. 7 Jac. 6. the oath of allegiance) before the lord steward or his deputy, or suffer the penalties, as if he had sat without election, return, or authority.

By the st. 30 Car. 2. 1. sess. 2. no peer, or member of the house of commons, shall vote or sit during any debate, after the speaker is chosen, till he take the oaths of allegiance and supremacy, and repeat and subscribe the declaration against transubstantiation and invocation of saints, &c. betwixt nine and four of the o'clock, at the table, in a full house, in such order as the house is called over, on pain to suffer as a popish recusant convict, &c. and a writ shall issue to elect a new member, &c.

By the st. 1 W. & M. 8. every person required by any act to take the oath of supremacy made 1 El. 1. or the oath of allegiance made 3 Jac. 4. which are hereby abrogated, or either of them, shall instead thereof take and subscribe the oaths of allegiance and supremacy here prescribed.

By the st. 7 & 8 W. 3. 27. every member of the house of commons was obliged to subscribe the association. But by the st. 1 Ann. 22. this part of the said act is declared to be void.

By the st. 13 & 14 W. 3. 6. no peer, or member of the house of commons, shall vote or sit during any debate, after the speaker is chosen, till he take and subscribe the oath of abjuration, (and by the st. 1. Ann. 22. it shall be taken as there altered,) at the time, place, and on the pain *ut supra* by the st. 30. Car. 2. 2.

[*Vide etiam*, 1 G. 1. st. 2. c. 13. 40 G. 3. c. 67.]

If there be not any lord steward, the treasurer or comptroller of the household by common usage is his deputy to all intents. D'Ew. 122.

If there be a lord steward, he may appoint others to be his deputies to take the oaths. D'Ew. 40.

And other lords may be appointed.

Or, any of the members, after they are sworn, may be his deputies, for giving the oaths to others. D'Ew. 40.

#### (E 5.) Choice of a speaker.

Antiently there was no constant speaker. 4 Inst. 2.

But there was a speaker, 44 H. 3. Semb. D'Ew. 40.

And the first prolocutor named upon record was 51 Ed. 3. *viz.* Sir Thomas Hungerford. D'Ew. 40. Cot. Ab. pref. 13. b.

But in the parliament rolls, *temp.* R. 2. and from that time, the speaker is frequently mentioned. D'Ew. 41.

None can be speaker without election of the commons. 4 Inst. 8.

And their election is free. D'Ew. 41.

But

But the king may recommend. 4 Inst. 8. Cot. Abr. pref. 14. b.  
Or refuse him. Ibid.

Yet, antiently, there was no command for the election of a speaker.  
D'Ew. 41.

The first command for it was 2 H. 4. Ibid.

And it was afterwards omitted, 7 & 8 H. 4. Ibid.

But it is now usual, and by long usage necessary at this day. Ibid.

The speaker elect disables himself. 4 Inst. 8.

Then he is presented to the king in the house of lords, and there excuses himself. 4 Inst. 8. Rush. 480.

And from the 6th year of H. 6. they have usually made an excuse.  
D'Ew. 42.

But sometimes he does not make any excuse; as, Mr. Harley did not, 13 W. 3.; and, antiently, it was not made except for cause; as, 5 R. 2. was the first excuse, and not allowed. 1 H. 4. 6 H. 4. H. 5. 28 H. 6. 29 H. 6. it was not made. D'Ew. 42.

And, before confirmation by the king, he was called speaker, when the commons were summoned to attend the king. 16 Nov. 1699.

So, 21 Oct. 1702. But usually he is not so called.

If the speaker be approved by the king, he prays; 1. Freedom of speech, and all their antient privileges; 2. Pardon for mistakes, and that he may resort to the commons for a declaration of their intent; 3. Access to the king. 4 Inst. 8. 21 Jac. Rush. 119. Ha. Parl. 4.

Freedom from arrest, of speech, and access to the king, and candid construction of their proceedings. 3 Car. Rush. 484.

So, per Mr. Harley, 1702.

The house of commons cannot assemble without their speaker.  
4 Inst. 8.

And, therefore, if he cannot attend for sickness, he shall be discharged; as, John Cheyne, 1 H. 4. Wm. Sturton, 1 H. 5. Sir John Tirrel, 15 H. 6. Ibid.

After the speaker chosen, and the oaths, according to the st. 30 Car. 2. and 13 W. 3. taken, a bill is read; and from thence the session begins.  
So, 23 Oct. 1702.

And after a bill read, the house is summoned to attend the king in the house of peers, to hear the king's speech.

Sometimes the house is summoned to attend the king before a bill is read; so it was, 16 Nov. 1699; so it is usually done. So, it was 1702, 1710.

And the king's speech was reported to the house by the speaker, before a bill was read, 16 Nov. 1699; but the speaker said, that he could not do it till the oaths were taken, according to the statutes. 21 Oct. 1702.

And it was not reported, till after a bill read, and committees appointed, and other orders made, 23 Oct. 1702.

After a bill read, and before committees appointed, &c. 29 Nov. 1710.

After the king's speech is reported, the house usually returns thanks for it. So, 23 Oct. 1703. 29 Nov. 1710.

And appoints a day for the consideration of it. 16 Nov. 1699. So, 23 Oct. 1702.

Then



Then a day is appointed, in which the house will resolve itself into a committee for the consideration of it. 24 Nov. 1699.

And the house appoints a committee, for an address upon their vote of thanks.

Or, to be drawn upon their vote, and the debate in the house. 29 Nov. 1710.

When the address is reported from the committee, it may be agreed to, or amended by the house. 30 Nov. 1710.

After the house agrees, it shall be presented to the king by the whole house usually. 30 Nov. 1710.

And the members of the privy council are appointed to inquire the time when the king pleases to be attended by the house. 30 Nov. 1710.

The summons to attend the king is made by the usher of the black rod.

Or, by his deputy-usher. 16 Nov. 1699.

When the speaker reports the king's speech, he prays a copy of it, and reads the copy. 16 Nov. 1699. 29 Nov. 1710.

So, the speaker ought to be conformable to the command or order of the house; and therefore, if he be required by the majority to propose the question, it will be a breach of privilege if he disobeys, though it be by the king's command. R. 16 Car. 3. Rush. 1137.

#### (E 6.) Committees appointed.

The commons in parliament are the general inquisitors for the realm. 4 Inst. 11.

And at the beginning of the sessions, it is their principal care to appoint committees for grievances, &c. Ibid.

The general committees appointed after the reading of the first bill, are, a committee for religion, for grievances, for justice, for trade, for privileges, and elections. 13 Feb. 1700. 16 Nov. 1699. So, 23 Oct. 1702.

A committee is general, *i. e.* of the whole house; *de quo* vide post, (E 13.) or a private committee.

#### (E 7.) Chairman.

The committee appoints one of them for chairman. 4 Inst. 12.

The chairman reports the resolution of the committee to the house. Ibid.

Or, another whom the committee appoints for this purpose. Semb. Ibid.

#### (E 8.) Committee for a private bill.

In a committee for a private bill, the chairman shall not sit without a week's public notice set up in the lobby. Declared for a standing order, 15 Feb. 1700.

And upon the report of a private bill, he shall inform the house, whether the allegations of the bill are examined, and the parties concerned have consented, to the satisfaction of the committee. Declared for a standing order, 15 Feb. 1700. So, 24 Nov. 1699.

Before a private bill be considered by a committee of the lords, a copy  
of

of it shall be delivered to every one concerned in it. Declared for a standing order, 16 Nov. 1705.

And if an infant be concerned, a copy shall be delivered to his guardian, or next relation of full age, not concerned in interest, nor in the passing of the bill. Declared for a standing order, 16 Nov. 1705.

By a standing order of the lords, 23 April 1698, a committee shall take no notice of the consent of any person to any private bill, unless he appear before them, or there be an affidavit of two persons made, that he is not able to attend, and doth consent to the bill.

If a bill be for a sale of land in such a place, and a purchase in another, the committee shall see that the values are fully proved, and that there be an agreement for the purchase, and that the bill provides for the effectual purchase and settlement of the lands, as it is desired. Ordered 16 & 19 Feb. 1705.

And if trustees are appointed by the bill, they ought to appear personally before the committee, and accept the trust under their hands. Declared for a standing order, 16 & 19 Feb. 1705.

The lord, who makes the report of the committee, shall report that all orders were observed by the committee. Order, 16 Feb. 1705.

(E 9.) Committee for other purposes.

So a committee is frequently appointed for other purposes; as, for inspection of the journals of another session. 27 Nov. 1699.

For the inspection of the journals of the peers.

But it was not usual till later times to appoint committees to determine any particular thing, without a report to the house. Cot. Ab. Pref. 14. b.

(E 10.) Instruction to a committee.

After a committee is appointed, the house may give any particular instruction to it. So, 27 Nov. 1699.

So, a matter referred to one committee may be afterwards transferred to another. 11 Jan. 1699.

(E 11.) Witness attending the house, or a committee.

If a witness refuse to attend the house, or a committee, he shall be summoned by order of the speaker, or chairman, to attend. Vide post, (E 15.)

But no witness pays any thing for being summoned to the house, or a committee. Declared 29 Jan. 1699.

Nor shall he be arrested upon his coming to or departure from the committee; and if he be, the house upon motion will discharge him. R. 15 Feb. 1699.

An officer may be summoned to attend with the public books of a corporation, &c.

If any one directly or indirectly attempts to prevent a witness from appearing, or giving testimony, or tampers with a witness, in respect of the evidence to be given to the house, or to a committee; this is a misdemeanor, and the house will proceed against him with severity. R. 24 Oct. 1702. 29 Nov. 1710.

So, if a witness gives false testimony to the house, or a committee. R. 24 Oct. 1702. 29 Nov. 1710.

(E 12.)

## (E 12.) When committees are to sit.

A committee cannot continue sitting after the house is assembled.

And if committees are adjourned, a committee cannot sit till committees be again revived. Declared for a standing order, 23 Jan. 1699.

## (E 13.) Committee of the whole house; when necessary.

The house will not proceed upon a petition, motion, or bill for granting money to the king, charging the subject, or compounding or releasing a debt due to the king, except in a committee of the whole house. Declared for a standing order, 29 Nov. 1710. Vide post, (H 17.)

## (E 14.) Committee for justice.

A committee for justice may summon any judges, and examine them in person, upon complaint of any misdemeanor in their office. 1 Sid. 338.

## (E 15.) Committee of elections.

The committee of privileges and elections usually meets in the speaker's chamber, and then adjourns into the house.

There ought to be to the number of five, who are named of the committee before adjournment.

And there ought to be at least eight of them continuing in the house, otherwise the committee does not proceed.

But it is usually ordered, that all the members present have votes. So, Journal, 13 Feb. 1700. So, 23 Oct. 1702. But, antiently, it was otherwise.

A petition which concerns an undue election or return, &c. is usually referred to the committee of privileges and elections.

And the committee usually appoints the day for hearing.

Or, the house may direct the hearing upon a particular day. 14 Dec. 1710.

But it may be heard at the bar of the house. 1 Dec. 1710.

And, antiently, it was referred to the determination of the king and the lords. Semb. Cot. Ab. Pref. 14. b.

So, if, upon a double return ordered to be shown to the house, it appears that there were equal votes for all the candidates, it may be declared void, and a writ ordered for a new election, without a reference to the committee. 1 Dec. 1710.

So, if one of the parties returned waives his return, it may be amended by the house. 2 Dec. 1710.

This committee considers all matters concerning the return, election, and privileges of the members. Journal, 13 Feb. 1700. 16 Nov. 1699. 23 Oct. 1702.

Double returns are usually determined in the first place; for the house is not full before the determination of them. Journal, 15 Feb. 1700. 16 Nov. 1699. 23 Oct. 1702.

It is usually ordered, that all returns be questioned within fourteen days. Journal, 13 Feb. 1700. 16 Nov. 1699.

So, within fourteen days after another return made. Journal, 13 Feb. 1700. 23 Oct. 1702.

That any person, returned for two places, shall elect for which he will serve within three weeks, if there be not any question of the return for such place. Journal, 13 Feb. 1700. 23 Oct. 1702.

That

That all persons, returned upon a double return, withdraw till their return be determined. Journal, 13 Feb. 1700. 23 Oct. 1702.

And every member ought to withdraw when his return, election, or privilege is debated. Ibid.

[List of voters intended to be objected to, how and when delivered to clerk of house of commons. 53 G. 3. c. 71.]

[Recognizances by petitioners for payment of costs. Ibid.]

[Costs taxed as between attorney and client. Ibid.]

And only two counsel of a side shall be admitted. Journal, 13 Feb 1700.

As to a petition concerning an election, or privilege. Vide post, (F 3.)

The serjeant shall give order to the door-keepers and messengers to attend the committee of privileges and elections, and provide that none crowd the stairs below, or above in the gallery. Declared for a standing order, 16 Dec. 1699.

The witnesses at the committee shall be examined separately, and then withdraw; and the passage shall be free for this purpose. Declared for a standing order, 16 Dec. 1699.

If the house judges a petition concerning election, frivolous or vexatious, it will order satisfaction to the party grieved. R. nem. con. 13 Feb. 1700. R. 24 Oct. 1702.

If it appears, that any person procured himself to be elected or returned, by bribery or corruption, the house will proceed with severity against him. R. nem. con. 13 Feb. 1700. R. 24 Oct. 1702. Vide post, (G 5.)

[By stat. 10 G. 3. c. 16. and 11 G. 3. c. 42., after day appointed to consider petition, the first time there are one hundred members present, the names of forty-nine present are to be drawn out of the names of the whole house; each party names one not drawn; each party strikes out alternately one of the forty-nine, till they are reduced to thirteen; these fifteen make a committee to determine the election; thirteen must be present. None can vote who have not been present every sitting. They have power to send for persons, papers, &c. and to examine on oath. Notice is to be given to all parties. If there are more than two parties interested, the thirteen ballotted members nominate the two nominees. Made perpetual by st. 14 G. 3. c. 15.]

[The two members chosen out of the thirteen under the 11 G. 3. c. 42. may be set aside for any of the same causes as those chosen by lot.]

[Vide 1 Gabbett, 103. 139.]

## (F) Petitions.

(F 1.) By the lords, or commons, to the king.

Petitions in parliament are, some of grace, some of right. 4 Inst. 11.

Some by the lords temporal, some by the lords spiritual, some by the commons, some by all of them. Ibid.

The parliament shall not be ended, till all petitions are answered. Ibid.

Petitions ought to be certain, to which a certain answer may be given. Ibid.

The commons ought to petition the king, and acquaint him with their grievances. 18 Jac. By the king to the parliament. Rush. 22.

A petition against recusants presented to the king by the lords and commons, 1 Car. and the king's answer. Rush. 181. The like, 4 Car. Rush. 516.

### (F 2.) By other subjects to the king.

So, any subjects may of right make a petition to the king for redress of grievances. R. 27 Oct. 1680.

And if any traduce the right of such petition, it is unlawful. R. 27 Oct. 1680.

But if subjects framed petitions to the king in a public cause, and collected a multitude of hands to it, it was a misdemeanor and fineable. R. 2 Cro. 37. R. Mo. 755.

So, by the st. 13 Car. 2. 5. no person shall solicit or procure the hands or consent of any, above the number of twenty, to any petition, remonstrance, or address to the king, or both or either house of parliament, for the alteration of matters established by law in church or state, unless first consented to and ordered by three justices of peace, or the major part of the grand jury, at the assizes or quarter sessions, or, if in London, by the mayor, aldermen, and common council. And none shall present to the king, both or either house of parliament, any petition, remonstrance, or address, accompanied with excessive numbers of people, more than ten at once, on pain of a sum not exceeding 100*l.* and three months' imprisonment, without bail, for every offence, to be prosecuted in B. R. the assizes, or quarter-sessions in six months after, and proved by two witnesses.

[This statute is not virtually repealed by the bill of rights. 1 W. & M. sess. 2. c. 2. s. 1. art. 5. Dougl. 592.]

### (F 3.) Petition to the commons.

So, a petition may be to the house of commons: as, for a false election, or return of any to serve in parliament.

But such petition shall be within fourteen days after the committee for privileges and elections is appointed, or within fourteen days after a subsequent return made. 16 Nov. 1699.

And if a petition in another session, for a matter not heard upon the petition in the former session, varies from the first petition, it shall be rejected; as, if the first petition be against two, and the second against one member only. 28 Nov. 1699.

And it may be referred to the committee to examine, whether the second petition be of the same nature in substance with the first. 29 Nov. 1699.

And if it be not the same in substance, it will be ordered that the committee do not proceed upon it.

If the petition be not signed, it shall not be received.

So, if it be against no person in certain, it shall be rejected. 30 Oct. 1702.

So, every petition ought to contain such certainty and particularity, that a direct answer may be given. Ha. Parl. 9. (Vide 4 Inst. 11.)

[Petitions may be presented within six months after report.]

[Vide *supra*. (E 15.)]

(F 4.)

(F 4.) The proceeding upon petitions.

When a petition is presented to the house of commons, sometimes upon disclosure of the substance of the petition, it will be rejected. 18 Dec. 1699.

Sometimes it shall be referred to a committee to examine the matter of the petition, and report it, with their opinion, to the house. 8 Dec. 1699.

Sometimes the matter of the petition shall be examined at the bar of the house. R. 24 Oct. 1702.

After a petition received and read, the petitioner, by leave of the house, may withdraw it.

All petitions ought to be discussed before the conclusion of the parliament. H. Parl. 9.

(G 1.) The law and usage of parliament.

The parliament, *suis propriis legibus et consuetudinibus subsistit*. 4 Inst. 15. 50.

All matters moved, concerning the peers or commons in parliament, ought to be determined according to the usage and customs of parliament, and not by the law of any inferior court. H. Parl. 14.

(G 2.) In preventing annoyances.

By the ancient usage of parliament, proclamation shall be made in Westminster at the beginning, that none, on pain that he forfeit all that he has, shall wear a privy coat, or armour, in London, Westminster, or the suburbs. 4 Inst. 14.

So, proclamation shall be made, that no games or pastimes shall be used to the disturbance of the parliament. Ibid. Order 12 Dec. 1699. Ha. Parl. 13.

So, it was ordered that the door of the speaker's chamber be locked at the sitting of the house, and the keys laid on the table. 24 Nov. 1699. R. for a standing order, 24 Oct. 1702.

• That the serjeant prevent footmen and others standing on the stairs in the passage to the house, to prevent annoyance by them. Declared for a standing order, 18 Jan. 1699.

That letters be not delivered by the postman, till the rising of the house. R. 24 Oct. 1702.

(G 3.) In inquiring of misdemeanors.

The commons are the general inquisitors of the realm. 4 Inst. 11. 24.

And therefore, if a lord spiritual or temporal commit oppression, bribery, extortion, &c. the commons shall inquire of it; and if, by the vote of the house, the crime appears to have been committed, they transmit it with the evidence to the lords. 4 Inst. 24.

(G 4.) What are good grounds for an inquiry.

Common fame is a sufficient ground of a proceeding in the house of commons by inquiry, or by a complaint, if need be, to the king or the lords. R. 1 Car. by the commons. Rush. 217.

(G 5.) In punishment of offences : — In the lower house : —  
Offences done by the members : — Bribery.

One Long gave 4*l.* to be chosen, and was removed. 8 El. 4 Inst. 23.

The house will proceed with severity against any chosen by bribery or corruption. 29 Nov. 1710. Vide ante, (E 15.) — Vide officer (I).

Hill writing a book to the dishonour of the house of commons, of which he was a member, and for discovering the conferences of the house, after examination, was expelled, and committed to the Tower for six months, and fined 500 marks. 23 El. 4 Inst. 23.

(G 6.) Offences by others.

A mayor taking 4*l.* for electing a burgess was fined and imprisoned. 8 El. 4 Inst. 23. [Vide ante, (D 10.)]

One committed to the Tower for striking one, returned upon record as a burgess to parliament; for he ought to take notice of the record at his peril. Ibid.

So, a man who misbehaved himself at elections, was ordered to be prosecuted by the attorney-general. 18 Nov. 1702.

So, where the bishop of Worcester was censured for a violation of the privileges of the commons, at the election of a knight for the county of Worcester, there was an address to the queen for his removal from the place of lord almoner. 18 Nov. 1702.

The lords addressed contra; but he was removed.

After the impeachment of the duke of Buckingham, the university of Cambridge chose him their chancellor, by which they displeased the house of commons. 2 Car. Rush. 372.

How the lords proceed upon an impeachment. Vide post. (L 18, &c.)

[The house of lords may fine and imprison for a breach of privilege; thus, for a libel on one of their members. 8 T. R. 314.]

[The house of commons have authority to commit in cases of contempt as for a breach of privilege. 14 East. 1. 4 Taunt. 401. 5 Dougl. 166.]

[The outer-door may be broken open after demand and refusal to arrest under the speaker's warrant issued for a breach of privilege, pursuant to a resolution of the house of commons. 14 East. 1.]

[As to when the military may be called in aid to execute the speaker's warrant of arrest, issued pursuant to a resolution of the house of commons. 14 East. 163.]

[In justifying a commitment for a breach of privilege under the speaker's warrant, pursuant to a resolution of the house of commons, the facts upon which the resolution professes to proceed need not be averred. 14 East. 1.]

[A member of the house of commons committed for a breach of privilege, cannot be discharged on a *habeas corpus* during the session. 2 Blk. 754. 3 Wils. 188.]

(G 7.) Things done or said in parliament shall not be questioned elsewhere.

A thing moved or done in parliament shall not be discussed elsewhere. 4 Inst. 15.

And

And therefore, the judges shall not give any opinion of a matter of parliament. 4 Inst. 15.

If any absents himself from parliament, if a suit or information be for it in B. R., he shall plead to the jurisdiction of the court, that it ought to be determined in parliament. — So, the bishop of Winchester, 3 Ed. 3. 4 Inst. 15. and an information against thirty-nine for the same cause, 3 & 4 Ph. & M. and six submitted, but nothing done to the others. 4 Inst. 17.

By the st. 4 H. 8. 8. all accusations of members, for any matter in parliament, shall be void. Ha. Parl. 7.

No member shall be molested for a thing said or done in parliament, except by the house. By the commons, 19 Jac. Rush. 53. But the king razed it out of the journal. Ibid. 54. R. 5 Car. Rush. 663.

The king shall not give credit to an information of a thing done or said in parliament, till he be informed by the house itself. By the commons, 19 Jac. Rush. 53. But the king razed it out of the journal. Ibid. 54.

An address, that the king would shew his indignation against those who misrepresent proceedings in parliament. R. 28 Nov. 1699.

So, none ought to be censured by another court for the proceeding in parliament. Per Pym. 3 Rush. 1132.

[If a libel charge a member with criminal language held in parliament, the court will grant an information against the libeller, without a denial of the charge by affidavit. Doug. 387.]

But for a matter out of parliament, a member of parliament may be punished elsewhere, after the end of the session, if he be not questioned for it in parliament. R. 5 Car. Rush. 663. (*Qu.*)

If for a thing not done in the way of parliament. Ibid. (*Qu.*)

As, a conspiracy to inveigh against the judges or king's counsel in parliament, without an intent to prosecute them in a legal course, but with intent only to defame them. R. 5 Car. Rush. 663.

### (G 8.) Liberty of speech.

Freedom of speech is the antient and undoubted right and inheritance of parliament. Claimed 19 Jac. Rush. 46. But disallowed by the king. Ibid. 52. and then claimed by protestation. Ibid. 53. But the king razed it out of the journal. Ibid. 54.

By the st. 4 H. 8. 8. all suits, &c. against R. Strode and his accomplices, or any other hereafter, for any bill, speaking or reasoning of any thing concerning the parliament, shall be void.

This statute was a particular law. R. by all the judges, 5 Car. Rush. 662. R. cont. in parliament. Cro. Car. 604.

But all members of parliament ought to have freedom of speech upon matters debated in parliament, by the course of parliament. R. by all the judges, Rush. 662.

And none shall be put to answer elsewhere for speaking in parliament, though it be suggested to be with a bad intent. R. in Parliament, 1667. Vide Cro. Car. 604.

By the st. 13 Car. 2. 1. there was a proviso, that nothing in the said act should extend to deprive either house of parliament, or the members thereof, of their just and ancient privilege of debating any matters propounded



propounded in either house, or at any conference or committee, or touching the repeal or alteration of any old, or preparing any new law, or redressing any public grievance. But members shall have the same freedom of speech and privileges as before.

And by the st. 1 W. & M. 2. sess. 2. it is declared, that the freedom of speech and debates, or proceedings in parliament, ought not to be impeached or questioned, in any court, or place out of parliament.

(G 9.) Debates there shall not be divulged.

So, debates in the house of commons ought not to be divulged without the order of the house.

So, the lords ought not to take notice of any thing debated by the commons, till it be declared to them by the commons. R. 16 Car. 3 Rush. 1147.

Nor, the commons, of a thing debated by the lords. 3 Rush. 1147.

(G 10.) *In legem datione* : — The manner of enacting a statute. There ought to be the assent of king, lords, and commons.

Every act of parliament shall have the assent of the lords and commons, and of the king. 4 Inst. 25. 2 Inst. 157.

If there be the consent of one or two of them, it is only an ordinance. 4 Inst. 25.

So, if it be with the consent of the king and the lords temporal only, (without the spirituality,) and the commons. Semb. 4 Inst. 25. Vide ante, (D 1.) — Post. (R 3.)

Or, with the consent of the king, and the lords spiritual only, (without the temporalty,) and the commons. 4 Inst. 25.

And therefore an ordinance by the lords, 6 Ed. 3. that none shall refuse to serve the king as a judge, or otherwise, in Ireland, does not bind the subject. 2 Inst. 47, 48.

So, the 46 Ed. 3. that none of the profession of the law shall be chosen by the commons to serve in parliament. 4 Inst. 48.

So, a bill by the king to attain any with the assent of the lords, without mention of the commons, is not a law. F. Parl. 3.

(G 11.) Bill introduced.

A bill may be introduced by any member.

But it shall be after an order of the house, upon a motion for such a bill; and it is ordered, that such member prepare and bring in the bill. 24 Nov. 1699.

And sometimes a committee is ordered to prepare a bill. 28 Nov. 1699.

But a private bill shall not be brought in, without a petition which suggests the causes for it. Ordered and declared for a standing order, 15 Feb. 1700. Ord. 24 Nov. 1699.

Nor, in the upper house. Declared for a standing order. 7 Dec. 1699.

And such petition to the lords shall be signed by all concerned in the consequences of the bill. Ord. 16 Feb. 1705.

And it shall be referred to two judges, who ought to summon before them

them all who may be concerned in the bill, and make a report under their hands of the state of the case, and their opinion of it. Declared for a standing order, 16 Feb. 1705.

(G 12.) Bill read.

A bill shall be read three times before it be passed.

A private bill shall be printed.

So, in the house of lords it shall be printed, and delivered to the clerk for the lords. Ord. 16 Nov. 1705.

Three days ought to intervene between every reading of a private bill. Declared for a standing order, 15 Feb. 1700. Ord. 24 Nov. 1699.

It shall not be read to the lords upon a day appointed for hearing of causes, before the cause heard. Ord. 14 and 18 Jan. 1705.

When a bill is presented upon an order of the house, it shall be received and read the first time. 23 Oct. 1702.

Though it be a private bill. 12 Dec. 1699.

Or, the first reading may be appointed upon a subsequent day. 19 Dec. 1699.

And if, upon receipt of the bill, no time be appointed for reading it, it shall be afterwards read upon motion, or, upon motion, a day shall be appointed for reading it. 20 Dec. 1699.

Or, the first reading may be appointed immediately after the receipt. 24 Jan. 1699.

After the first reading, it shall be ordered that the bill be read a second time. 16 Nov. 1699.

And sometimes, that it be read a second time at a certain day. 29 Nov. 1699.

Though it be a private bill. 30 Nov. 1699.

If a day certain be not limited for the second reading, there ought to be a motion, upon which a day shall be appointed. 11 Dec. 1699.

Or, upon motion for the second reading, it shall be read immediately.

And sometimes the second reading is directed to be in a full house. 20 Jan. 1699.

Sometimes afternoon of such a day. 25 Jan. 1699.

Sometimes upon such a day, and that nothing intervene. 24 Jan. 1699.

(G 13.) Committee.

After the second reading, the bill shall be committed to a committee to be considered there. Vide ante, (E 6, 7, 8.)

Sometimes it is committed to a committee of the whole house. Vide ante, (E 13.)

If there be no objection to a bill, upon the second reading, nor any blank in it, it shall be ingrossed without a commitment. — So it was, 6 Feb. 1699.

Sometimes it shall be committed upon the first reading. D'Ew. 1769.

So, bills of grace, as for a general pardon, shall be passed upon the first reading, without more. D'Ew. 73. 464, 465.

Sometimes the bill shall lie, without an order to be committed, or ingrossed. D'Ew. 111.

Yet, regularly, upon the second reading, if it be not passed or rejected, it ought to be committed or ingrossed. D'Ew. 464.

And it ought to be committed or ingrossed upon the day when read; though anciently it has been done upon another day. D'Ew. 27.

(G 14.) The duty of the speaker upon the reading.

After the reading of a bill, it shall be delivered, with a brief of it, to the speaker, who reads the title, and then reports the substance of the bill to the house.

So, in the house of peers. D'Ew. 17.

(G 15.) Bill opposed, or debated.

After the bill is read, and the effect of it reported to the house, it may be opposed by any member.

And a bill may be opposed, debated, or rejected upon any of the readings.

Upon the first reading. D'Ew. 17.

Upon the third reading. D'Ew. 271.

But the usual course is upon the second reading. D'Ew. 17.

(G 16.) Bill ingrossed.

After a bill is passed the committee, and reported to the house, it shall be ordered to be ingrossed.

So, if no objection be to the bill, nor any blank, it may be ingrossed upon the second reading, without commitment. So it was done, 6 Feb. 1699.

But a bill transmitted from one house to another, is not ordered to be ingrossed; because it was ingrossed, and comes in parchment from the other house. D'Ew. 17. 20. 148.

So, bills of grace, as for naturalization, pardon, &c. are not ordered to be ingrossed; because they come to the house engrossed in parchment, and signed by the king. D'Ew. 20.

(G 17.) Bill passed the house.

After the third reading of a bill by the clerk, and the effect of it reported by the speaker, if nothing be spoken to it, the speaker proposes the question, whether it shall be passed? D'Ew. 45.

(G 18.) Transmitted for the assent of the other house: —  
From the commons to the lords.

When a bill is passed by the commons, the clerk, within the bill at the top upon the right hand, writes, *soit baille aux seigneurs*. D'Ew. 45. Fitz. Parl. 1.

Then it shall be transmitted to the lords by some of the commons.

When a bill is presented by the commons to the other house, the chancellor and lords rise, and at the bar receive it from those who bring it from the commons. D'Ew. 585.

(G 19.) From the lords to the commons.

If a bill be passed by the lords, it shall be indorsed, *soit baille aux commons*. Dy. 93. a.

Then it is transmitted to the commons by two of the assistants in the house of peers.

These

These being admitted into the house of commons, after three *congees* at the table, inform the house that the lords have passed such a bill, and they read the title. D'Ew. 45.

If the messengers of the lords see the speaker, at his entry into the house of commons, they cannot deliver the bill, but ought to deliver it in the house. D'Ew. 688.

And where a speaker received it at the door, and took it and delivered it to the house, it was returned to the lords. Ibid.

### (G 20.) Amendments to a bill by the lords.

Though a bill be transmitted to the lords, yet it remains a bill of the commons. D'Ew. 576.

If the lords make an amendment by the omission, change, or addition, of any words, it ought to be written in paper with a reference to the line where it ought to be made. D'Ew. 20. 576.

And then the lords subscribe the bill with these words, *a cesty bill ovesque les amendments a mesme le bill annexe les seigneurs sont assentus*. D'Ew. 576.

But the amendments ought not to be written in parchment. D'Ew. 534. 576.

When a bill, with amendments, is returned to the other house, there the bill shall not be read another time, but the amendments only. D'Ew. 271.

If the amendments are agreed to by the commons, the bill is amended by them. D'Ew. 576.

If one house does not approve the amendments of the other, it cannot reject them; but ought to reject the whole bill, or receive it with the amendments. D'Ew. 513. 537.

But one house may make additions to the amendments of the other. D'Ew. 534.

If the lords add a new clause, or proviso to a bill, it shall be ingrossed in parchment, and subscribed, *soit baille aux commons*, and then the bill with the clause annexed shall be transmitted to the commons, with this subscription, *a cesty bill ovesque le schedule ou provision a mesme bill annexe les seigneurs sont assentus*. D'Ew. 26. 576.

### (G 21.) Royal assent.

The king usually gives his assent to acts passed by both houses in person.

But he may declare his assent by letters patent, and appoint any one to notify such assent, and the clerk to indorse it, in the usual form. D'Ew. 389. Dy. 93.

And by the st. 33 H. 8. 21. the king's royal assent by his letters patent under his great seal, and signed with his hand, and notified in his absence to the lords and commons, is and ever was of as good strength as though the king had been present, and assented publicly to the same, and shall hereafter be taken for effectual. H. Parl. 40.

When the king is ready to give the royal assent, the clerk of the crown reads the title of a public bill, and if the king allows it, the clerk of the lords says, *le roy le veult*. D'Ew. 35. 116.

If it be a private bill, the clerk says, *soit fait come il est desire*. D'Ew. 35.

After

After the other public and private bills are approved, or disapproved, the clerk of the crown reads the title of the act of subsidy, to which the clerk of the lords gives the king's answer, viz. *le roy remercie ses loyal subjects, accept leur benevolence, et aussi le veult.* D'Ew. 35.

Then if there be an act of pardon, after the title read by the clerk of the crown, the clerk of the lords pronounces, *les prelates, seigneurs, et commons, en ce present parlement assemblees, au nom de tous vous autres subjects, remercient tres humblement votre majeste, et prient à Dieu vous donner en santé bone vie et longue.* Ibid.

But acts for a subsidy or a pardon sometimes have the assent, before other public or private acts. D'Ew. 76. 116.

If the king disallows the bill, the clerk pronounces, *le roy s'avisera.* D'Ew. 35.

But if letters patent for his assent are not signed by the king; but the stamp of his name put to them by another, it is not sufficient. Semb. Dy. 93.

[Vide 33 G. 3. c. 13. as to indorsing the time of assent.]

### (G 22.) Inrolment of an act.

After the royal assent given, the clerk of the parliament transcribes every public act into a roll, and subscribes, *le roy le veult.* D'Ew. 35.

So, he transcribes every private act, and at the beginning says, *in parlamento inchoat. et tent., &c. inter al. inactitat. ordinat. et stabilit. fuit sequens hoc statutum ad verbum ut sequitur, viz.*—Then at the end adds, *ego A. B. clericus parlamenti virtute brevis supradict. domine nostre regine de certiorand. mihi direct. et hiis annex. certifico superius hoc scriptum verum esse tenor. act. parl. supradict. in eo brevi express. In cujus rei testimonium, &c.* D'Ew. 36.

Public acts after inrolment are delivered into chancery, and this is the original record. R. Hob. 109.

But private acts are not inrolled, without the suit of the party; and therefore the original bill, filed among the bills of parliament, and marked with the great seal, as the course is, is the original record of it. Ibid.

### (G 23.) Promulgation.

Before the invention of printing, the usage was, after the conclusion of a parliament, to transcribe all the acts in parchment, and by a writ to every sheriff of the kingdom command, *quod statuta illa et omnes articulos in eisdem contentos in singulis locis in balliva sua tam infra libertates quam extra, ubi expedire viderit, publice proclamari et firmiter teneri faceret.* 4 Inst. 26. H. Parl. 36. 1 Ch. R. Arg. 51.

And this writ was sometimes in Latin, sometimes in French. 4 Inst. 26.

The sheriff thereupon proclaimed them in his county court, where a transcript was preserved, that every one might read it, or take a copy of it. Ibid.

So, by *certiorari*, the tenor of the record of every act may be removed into the chancery, and delivered by the hand of the chancellor into B. R. 4 Inst. 43.

And by *mittimus* from B. R. it may be afterwards sent to C. B., or the exchequer. Ibid.

And

And the king by writ may command, that each court the act *firmiter observari faciat*. 4 Inst. 43.

But proclamation by the sheriff is not necessary; for every one ought to take notice of every thing done in parliament. 4 Inst. 26. H. Parl. 36.

And since printing has been used, the proclamation has been disused. 1 Ch. R. Arg. 53.

#### (G 24.) Conference with the lords.

Upon any message from the lords, the commons may desire a conference with them upon the subject matter of the message. 15 Feb. 1700.

The commons send one of their members to desire such conference. 15 Feb. 1700.

If the lords consent to the conference, and appoint the time and place, the member reports it to the house. 17 Feb. 1700.

After a conference appointed and agreed, managers shall be named for it. Ibid.

And instructions may be given to the managers. Ibid.

#### (G 25.) The manner of putting the question.

After a question is proposed, a motion may be made for the previous question, *viz.* whether the question proposed shall be now put. 2 Nov. 1702.

After the previous question proposed, the first question may be amended: agreed. Ibid.

But not after the previous question put. Agreed. Ibid.

If the previous question be moved and seconded, it shall be put first. Ibid.

And if it be carried in the affirmative, the main question shall be put. Ibid.

#### (G 26.) The manner of voting in the house of peers.

In the house of peers, the lords deliver their votes *seriatim*, beginning from the youngest baron. 4 Inst. 34.

And they say content, or not content. Ibid.

If the vote be delivered conditionally, as if he says, content as far forth as it swerves not from the law of God and the church, and imports no deadly sin, the condition shall be rejected. So it was, 6 H. 6. 4 Inst. 35.

#### (G 27.) In the house of commons: — At a committee.

At a committee, upon a division, the noes goes to one part of the house, the yeas to the other; for to the question they say, yea, or no. 4 Inst. 35.

Though it be a committee of the whole house. Ibid.

And then the number appears. Ibid.

#### (G 28.) In the house.

When the commons sit as an house, upon a division, if it cannot be determined by the sound of the voices which party is the majority, the noes sit, and the yeas go out of the house. 4 Inst. 35.

Then

Then two are appointed to number the parties, one the yeas, the other the noes, and deliver the numbers to the speaker in the house. 4 Inst. 35.

### (G 29.) Conference with the people.

If a new thing, or aid, be demanded, the commons may answer that they cannot consent without conference with their counties. 4 Inst. 14.

So, it was answered 9 Ed. 3. when a new sort of subsidy was demanded. 4 Inst. 34.

### (H) The subject matter of laws.

#### (H 1.) The parliament is absolute.

The parliament makes statutes, &c. concerning matters ecclesiastical, civil, capital, common, criminal, martial, maritime, &c. Co. L. 110. a.

The legislative power of parliament is so absolute, that it cannot be limited to things, or persons. 4 Inst. 36. H. Parl. 46.

*Parliamentum omnia potest.* Per Mont. Ch. J.

The arduous and urgent affairs concerning the king, the state, and defence of the kingdom and church, the maintenance and establishment of the laws, and the redress of grievances, are proper subjects for counsel and debate in parliament. R. by the commons, 19 Jac. Rush. 53. But the king razed it out of the journal. Ibid. 54.

The writ of summons says, that the parliament is summoned *pro arduis et urgent. negotiis, nos, statum et defensionem regni et ecclesiæ concernen.*

And therefore, not only things delivered by the king, or his chancellor, are subjects of their debate; but also all other affairs. H. J. P. 5.

#### (H 2.) May give the king a legislative authority.

By the stat. 28 H. 8. 17. power was given to the successor of the king to repeal by his letters patent, after his age of twenty-four years, any act which he had assented to before such age. 2 Rol. 164. l. 42.

#### (H 3.) Dissolution of a marriage, &c.

So, the parliament may annul a marriage. Pr. st. 8 & 9 W. 3. 27.

Dissolve a marriage, and make the children illegitimate. Pr. st. 9 & 10 W. 3. 11. H. J. P. 47. 4 Inst. 36.

Dissolve a former, and enable another marriage. Pr. st. 11 & 12 W. 3. 2.

Make a separation between husband and wife, for the severity of the husband. Pr. st. 12 & 13 W. 3. 16.

So, it may make a bastard to be legitimate. H. P. C. 47. 4 Inst. 36, 37.

Make the issue inherit in the life of his ancestor. H. J. P. 47. 4 Inst. 36.

#### (H 4.) Consultation about the king's marriage.

So, the king advised with his parliament in relation to his marriage. Cot. Ab. 9, 10.

(H 5.)

(H 5.) Enabling a sale, &c. and practicable by the rules of law.

So, the parliament may enable a sale, or settlement of lands, not practicable by the rules of the law; as, it may enable an infant to make a sale for the discharge of debts, &c. Pr. st. 10 & 11 W. 3. 46.

To make a jointure during his minority. Pr. st. 9 & 10 W. 3. 8.

Or, a settlement of an estate upon marriage. Pr. st. 10 & 11 W. 3. 38.

Or leases. Vide Pr. st. 10 & 11 W. 3. 48.

To execute a power.

So, it may enable a lunatic to make a sale, lease, &c. Pr. st. 9 & 10 W. 3. 16.

To execute a power.

So, it may enable any, by marriage-settlement or otherwise disabled, to sell lands for payment of debts.

To make a provision for wife or children.

To the intent to settle other lands to the same uses.

So, it may enable a charge to be transferred from one estate to another. Pr. st. 10 & 11 W. 3. 27.

So, it may enable a sale of copyhold lands. Pr. st. 9 & 10 W. 3. 5.

Or, vest them in trustees for payment of debts. Pr. st. 9 & 10 W. 3. 32.

So, it may make such a will to be the last will. Pr. st. 12 & 13 W. 3. 27.

It may adjudge a minor of full age. 4 Inst. 36.

May make an alien a natural subject. Ibid.

(H 6.) Matters criminal : — Attainder.

A bill of attainder may be against a man after his death. 4 Inst. 36. As. R. 3. was 1 H. 7. Bac. H. 7. 13.

So, against a man not arraigned, nor put to his answer, though he was in custody; as, against sir John Mortimer, 2 H. 6. — Against the earl of Essex Cromwell, 32 Hen. 8. But such proceeding ought to be condemned. 4 Inst. 37.

So, an attainder may be by bill in all cases where the parliament pleases. Cot. Abr. Præf. 10. Cot. Abr. 6.

So, by the st. 1 Jac. 2. the duke of Monmouth was attainted for high treason.

And by the st. 8 W. 3. 4. sir John Fenwick was attainted for the same offence.

And by the st. 13 & 14 W. 3. 3. the pretended prince of Wales.

So, it is usual by an act of attainder to enact, that such an one shall be attainted, if he do not render himself at such a day.

So, by an act, an absent man was attainted, with a reward to him who should apprehend him, whether he were alive or dead. Cot. Ab. 6.

[If a man is attainted unless he render himself at a certain day, and before the day is taken into custody, he may plead it as a surrender. John Murray of Broughton's Case, 1746. Foster, 47. N. B. This was denied in lord Duffus's Case, in parliament, 7 G. 2. Com. 440.

So,



So, in outlawry. It was denied in sir Thomas Armstrong's Case, 3 St. Tr. 895. But allowed in Roger Johnson's M. 2 G. 2. Str. 824.]

[A person may be attainted by an incomplete description, if it is not repugnant to truth; thus lord Forbes of Pitsligo was attainted by the name of lord Pitsligo. Foster, 79.]

[If an act enacts, that if A. does not surrender on 12th July, he shall stand attainted from the 18th April preceding, he is capable of taking lands by descent in the intermediate time; and such descent does not become divested or avoided by his not rendering himself to justice on the 12th July, so as to prevent the forfeiture in prejudice of the crown. Post. 88.]

### (H 7.) Exile.

So, the parliament sometimes makes an act for the banishment of a person.

Though he be not before convicted for any offence. Cot. Abr. Præf. 10.

### (H 8.) Fine and imprisonment.

So, the parliament, by an act, may impose a fine or imprisonment upon a person, without a trial by the law. Cot. Abr. Præf. 10.

### (H 9.) Matter civil : — Tallages : — Are granted by parliament.

No tallage or aid shall be granted without the assent of parliament, by the common law. 2 Inst. 59, 60. 528. 533. Rush. 429. R. in Parl. 3 Car. Rush. 513. And by the petition of right. 3 Car. Rush. 590. Vide Prærogative, (D 40.)

By the st. 25 Ed. 1. 6. *conf. chart.* no manner of aids for any occasion shall be taken, but by the common assent of the whole realm, and for the common profit of it. Vide 2 Inst. 529.

By st. *de tallagio non concedendo*, 34 Ed. 1. *nullum tallagium, vel auxilium ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum com. de regno.* Vide 2 Inst. 532. 2 Rol. 174. l. 5.

*Custuma antiqua*, viz. for every sack of wool 6s. 8d., for 300 woolfells 6s. 8d., for one last of leather 13s. 4d., was granted by parliament. 2 Inst. 59. 4 Inst. 29.

And no custom can be enlarged, or imposed *de novo*, without the assent of parliament. 2 Inst. 60.

But such grant is void. 2 Inst. 61. Vide Prærogative, (D 48.)

So, by the st. 14 Ed. 3. sess. 2. 1. the prelates, earls, and commonalty shall not be grieved with any aid, or to sustain any charge, if it be not by common assent in parliament. 2 Rol. 172. l. 35.

By st. 1 Ed. 3. 7. *conf.* by H. 4. 13. commissions to prepare men of arms, and convey them to the king, at the charge of the shire, shall not be granted any more. 2 Rol. 172. l. 25. 174. l. 25. Vide War, (B 6, 7.)

By the st. 25 Ed. 1. 7. the king shall take such aids, &c. without common assent no more. (Vide 2 Inst. 530.)

By st. 45 Ed. 3. 4. no imposition shall be put upon wool, &c. without the assent of parliament. 2 Rol. 175. l. 2.

So,

So, no tallage or charge can be put by the privy council, without the assent of parliament. 2 Rol. 174. l. 10. Vide Roy, (E 5.)

And though it was certified to the king by his judges, 12 Car. that when the safety of the kingdom requires, the king may by writ command all his subjects to provide, &c. ships, &c. for defence of the kingdom, and compel the doing of it in case of refusal; and though judgment was given against Hampden for such refusal, and the case afterwards refused to be argued. 2 Rush. 355. 480. Cro. Car. 524. 3 Rush. App. 159. Yet it was afterwards declared illegal by parliament, and judgment given against the levyers of the tax. Cro. Car. 601.

And by the st. 16 Car. 14. ship-money and the extrajudicial opinion of the justices and barons, and the writs, and the judgment against Hampden, are contrary to the laws, &c. of this realm, &c.

And by the same stat. the petition of right shall be firmly observed, &c. and the proceeding upon ship-writs, &c. be vacated, &c.

(H 10.) And the disposal examined by parliament.

By the st. 25 Ed. 1. 6. *conf. chart.* all aids shall be employed for the common profit of the realm. Vide 2 Inst. 529.

And a committee was appointed for examining how subsidies given for the recovery of the palatinates were employed. 1 Car. Rush. 176.

(H 11.) Customs.

When they began. Vide Prærogative, (D 43, &c.)

Anciently no custom was paid by native or alien, but for wool, woolfells, and pells. 4 Inst. 29.

The first custom, viz. 6s. 8d. upon every sack of wool, 6s. 8d. upon 300 woolfells, and 13s. 4d. upon a last of pells, was imposed as it seems 3 Ed. 1. 2 Inst. 59. 4 Inst. 29. Dy. 43. b.

By the st. 3 Ed. 1. upon merchants strangers 3s. 4d. in a noble *ultra antiquam custumam*. Vide 2 Inst. 59. Forst. 15.

But this does not extend to wool made into cloth. 4 Inst. 29.

The first statute which imposed a custom upon cloths, was the 21 Ed. 3. (Vide 4 Inst. 29.)

And another custom was imposed by the st. 27 Ed. 3. st. 2. 1. and 36 Ed. 3. 11. 2 Rol. 173. l. 15. (Vide 4 Inst. 30.)

By the equity of which, all cloths made of wool only, are now charged *pro ratâ*. R. 2 Jac. 2 Inst. 61, 62. 4 Inst. 31.

(H 12.) Tonnage and poundage; how granted.

Tonnage and poundage was granted for the safeguard of the sea and commerce. 4 Inst. 32. 2 Rol. 174. l. 20. 181. l. 10. Forst. 37.

And at first poundage only was granted; as, 2 R. 2. Forst. 38.

Afterwards tonnage and poundage.

And that 6d. *per* pound. 2 Rol. 175. l. 25. Forst. 38.

Afterwards 8d. *per* poundage. 2 Rol. 175. l. 45.

Afterwards 12d. 2 Rol. 176. l. 15.

Then 2s. for tonnage, and 6d. for poundage; as 5 R. 2. Forst. 38.

Anno 21 Ed. 3. 2s. for every ton of wine, and 6d. *per* pound for all merchandize imported, being granted by order of the king and the peers, was first established by parliament. 47 Ed. 3. Forst. 38.

And it was granted at first for years. 2 Rol. 175. l. 5.

Some-

Sometimes *pro hac vice*. (Vide 4 Inst. 32.)

Sometimes the grant was intermitted. Ibid.

Anno 3 H. 5. it was granted for life; and never before. 4 Inst. 32. 2 Inst. 61. 12 Co. 34. Forst. 39.

Anno 31 H. 6. it was granted for life, but woollen cloths excepted; as, ever afterwards. 4 Inst. 32.

4 Ed. 4. and 12 Ed. 4. it was granted to him for life; but without a retrospect. 4 Inst. 32. 2 Rol. 175. l. 50.

So 1 H. 7. and ever since it has been granted for life. 4 Inst. 32, 33. As, 1 H. 8. not in print.

So, by the st. 1 Ed. 6. 13. the st. 1 Mar. sess. 2. 18. the st. 1 El. 20. the st. 1 Jac. 33.

By the st. 6 W. & M. 1. it was granted only for five years.

By the st. 12 Car. 2. 4. it was granted to the king for his life.

So, by the st. 1 Jac. 2.

By the st. 6 Ann. 11. a moiety of these customs inward was granted for ninety-six years; and by the st. 1 G. 12. to the king and his heirs.

By the st. 7 Ann. 7. s. 28. the other moiety was granted to the queen and her heirs.

So, by the st. 3 G. 7. the subsidy outward.

So, 34 H. 6. 6. it was granted in Ireland, and was not due before. 2 Rol. 179. l. 15.

And therefore, where the king took it without a grant by parliament, it was unlawful.

So, where the king had charged an annuity upon the subsidy of tonnage and poundage, it was avoided by parliament. 2 Rol. 176. l. 20. Vide Prærogative, (D 48.)

### (H 13.) Subsidy, fifteenth, &c.

A subsidy was an aid granted by parliament upon land and goods, viz. 4s. by the pound upon land, and 2s. 8d. upon goods; and double upon the goods of aliens. 4 Inst. 33. Dy. 43. b.

The fifteenth is also an aid granted by parliament; and it was at first *quinto-decima pars bonorum mobilium*. But by commission 8 Ed. 3. it was ascertained in every town of England, and recorded in the exchequer, and afterwards granted according to such assessment. 2 Inst. 77. 4 Inst. 34.

A tenth was, *decima pars bonorum*, and rated according to the fifteenth. 4 Inst. 34.

The commons did not use to give, besides tonnage and poundage, any more than one subsidy, which amounted to 70,000*l.*, and two fifteenths, each amounting to 29,000*l.*, and the clergy only one subsidy, which amounted to 20,000*l.* 4 Inst. 33.

Anno 31 El. the commons first gave two subsidies and four fifteenths. 4 Inst. 33. — So, 32 H. 8. Forst. 33.

Anno 35 El. three subsidies and six fifteenths. — So, 39 El. (Vide 4 Inst. 33.)

Anno 43 El. four subsidies and eight fifteenths. (Vide 4 Inst. 33.)

Anno 3 Car. they gave five subsidies. Ibid.

The manner of taxation of a subsidy was by two taxers, who, being authorised by commission, chose a clerk to act with them, and these swore

swore four or six in each county to make an assessment, which was returned by indenture. Forst. 34.

(H 14.) Upon what terms granted.

And the parliament may grant a tax, or tallage, to the king, upon what terms or conditions they please. Seld. Jud. Parl. 17. Cot. Abr. 22.

As, 6 Ed. 3. that the king for the time to come should not burthen his subjects. Cot. Abr. 13.

So 22 Ed. 3. a fifteenth was granted, upon condition that 40s. *per* sack upon wool should cease, and the deceit of the merchants should not be pardoned. 2 Rol. 173. l. 30. 174. l. 15.

So, tonnage and poundage at first were granted upon conditions. 2 Rol. 175. l. 25. 50.

So, a certain sum may be granted absolutely, and a large sum upon condition. Cot. Abr. 19.

[Commissioners must charge land-tax on the several divisions, parochial or other, according to the proportions assessed on them under 4 W. & M. Parker, 74.]

[Exchequer has a general superintendence over all concerned in the revenue; it is restrained where the commissioners have final jurisdiction, not where they exceed it or neglect their duty. Ibid.]

[Commissioners of window-duty (and of others *semble*) are only answerable for what they respectively receive, not for the deficiency of others, but the division must make it good. Parker, 167.]

[The deputy post-master cannot demand any additional sum for delivering letters at the houses of the persons residing in the town. 4 B. M. 2149.]

[Letters must be delivered in all post-towns, on paying the legal postage only. 4 B. M. 2153. 3 Wils. 445.]

(H 15.) A caution that no such grant be afterwards made.

By the st. 25 Ed. 1. 7. and 34 Ed. 1. st. 4. 3. it was enacted, that the maletolt upon wools be released, and nothing taken for it in future. 2 Rol. 173. l. 40. 45.

By the st. 25 Ed. 1. 5, 6. the king grants that he will not draw any aids, tasks, or prizes into a custom for any thing done heretofore. 2 Rol. 173. l. 50.

So, 36 Ed. 3. a great subsidy being granted, it was provided that it be not drawn into example. 2 Rol. 180. l. 10.

(H 16.) Begin in the house of Commons.

So, the grant of a supply ought to begin in the house of commons, and if it be proposed by the lords at a conference, it will be a breach of privilege. R. 16 Car. 3 Rush. 1146.

(H 17.) The method of granting a supply.

No charge shall be imposed upon the subject but in a committee of the whole house. Vide ante, (E 13.)

Yet, in private bills, this is sometimes dispensed with.

No money shall be given to the king but in a committee.

If a motion be, that a supply be granted to the king, it shall be considered

sidered in a committee of the whole house. 15 Feb. 1700. So, 25 Oct. 1702. 30 Nov. 1710.

If it be resolved in a committee in the affirmative, the chairman reports that the committee has resolved it, and directed him to report it when the house will receive it, and another day is appointed for the report. 18 Feb. 1700. So, 27 Oct. 1702. 1 Dec. 1710.

When the report is made, the house appoints a day to resolve themselves into a committee to consider of the said supply. 28 Oct. 1702. 2 Dec. 1710.

When any resolution is made in a committee, a day is appointed for the report. 30 Oct. 1702.

When a supply is resolved by the house, estimates of the charge are usually directed to be laid before the house. 2 Dec. 1710.

[If a company is established by parliament for a particular purpose, (as insuring ships,) with a limited fund, which is exempted from being taxed, and the company afterwards by charter has its power extended (as to insure houses, &c.) with an increased fund, and they carry on their business under both jointly; the company is liable to the land-tax for their whole stock, and in their corporate capacity. 1 B. M. 155.]

### (H 18.) Limitation of the crown.

By act of parliament, the succession to the crown may be limited. Vide Roy, (A 3.)

By the st. 7 H. 4. 2. the crowns of England and France, &c. are entailed to king Henry, and the heirs of his body, and then to his four sons by name, and the heirs of their bodies successively.

By the st. 25 H. 8. 22. the crown is entailed to H. 8. and the heirs of his body, viz. to the first son of him and Q. Anne, in tail general, and so to every other son of their bodies successively in tail general; and for want of such issue, to the son and heir-male, and so to every other son and heir-male of the body of H. 8. successively in tail general; and for want of such issue, to the first issue female of H. 8. and Q. Anne, viz. to Eliz. in tail general, and so to every issue female, &c. and for want of such issue, to the right heirs of H. 8.

By the st. 28 H. 8. 7. Q. Mary and Eliz. are declared illegitimate, and the crown entailed to the king H. 8. and the heirs of his body, viz. to the first son of him and Q. Jane, &c. with power to H. 8. to devise, &c.

By the st. 35 H. 8. 1. after the death of H. 8. and prince Edward, and the heirs of their respective bodies, the crown is entailed to Mary and the heirs of her body, then to Eliz. and the heirs of her body, &c.

Afterwards, by the st. 1 Mar. 2. sess. 4. and by the st. 1 Mar. 2. Parl. 1. it is declared, that, after the decease of K. Edw. 6., the imperial crown, &c. did descend, remain, and come to Q. Mary, by due course of inheritance, and by the laws and statutes of this realm.

And by the st. 1 El. 3. it was recognized, that in her majesty, and the heirs of her body, the imperial and royal estate, crown, and dignity of this realm, was as fully invested as the same were in K. Hen. 8. K. Edw. 6. or the late Q. Mary, at any time since the st. 35 H. 8. 1.

By st. 1 W. & M. 2 Parl. 2. the crown shall be and continue to their majesties K. William and Q. Mary, during their lives, and the life of the

the survivor; and after their decease, to the heirs of the body of her majesty; and for default of such issue, to the princess Anne of Denmark, and the heirs of her body, &c.

By the st. 12 & 13 W. 3. 2. in default of issue of the said princess Anne, the crown is limited to remain to the princess Sophia, (daughter of Eliz. Q. of Bohemia, who was daughter of K. James 1.) and the heirs of her body, being protestants.

[So, parliament may appoint a regent, in case the crown shall afterwards descend to a minor; and st. 24 G. 2. c. 24. appointed Augusta princess dowager of Wales regent, in case any of her children succeeded to the crown under eighteen years of age.]

[St. 5 G. 3. c. 27. empowers the king to appoint the queen, the princess dowager of Wales, or some person descended from George 2. and resident in Great Britain, guardian of his successor, and regent till the successor is eighteen; and establishes a council of regency, and other regulations.]

### (H 19.) How the limitation may be secured.

By the st. 25 H. 8. 22. all shall swear to maintain the contents of that statute, which entailed the succession of the crown to the issue of Q. Anne.

By the st. 26 H. 8. 2. the oath there prescribed is, to maintain such succession, and to repute the oath to any other person as null; and not to permit, or attempt, any thing to the hinderance thereof, on any pretence, or by any means.

By the st. 28 H. 8. 7. all subjects shall swear to maintain the succession, &c. and if any other oath hath been made, to repute it as vain; and not to attempt, or permit, any thing to the hinderance, &c.

By the st. 35 H. 8. 1. all shall take the oaths for the maintenance of the succession of that act; and if they have taken former oaths, shall esteem it of the same effect as if they had taken this.

By the st. 1 El. 3. the parliament promise to defend the queen and the heirs of her body in their title to the crown, to the utmost of their power, and therein to spend their bodies, lands, and goods, &c.

So, by the st. 1 W. & M. 2 Parl. 2. and by the st. 12 & 13 W. 3. 2. the parliament submit themselves and their posterities to the limitations of the crown thereby settled; and promise to maintain the same with their lives and estates against all attempts, &c.

By the st. 13 W. 3. 6. and the st. 1 Ann. 22. all in office, &c. ought to take an oath to maintain the succession limited by the said act of 12 & 13. W. 3. 2.

By st. 1 Ann. 17. 2 Parl. if any attempt to hinder or deprive the next in succession from succeeding, he shall be guilty of high treason.

### (H 20.) Settlement of the king's revenue.

So, the parliament may appropriate a revenue for the support of the crown.

[By st. 1 G. 3. c. 1. 800,000*l.* *per annum*, out of the aggregate fund, is settled on the king for life; his majesty having signified his consent, that the hereditary revenue might be disposed of for the public utility, it is thereby made part of said fund. And, as Mr. Justice Blackstone

observes, the public is a gainer of upwards of 100,000*l.* *per annum*, by this disinterested bounty of his majesty.]

(H 21.) Resumption of grants.

So, the parliament may make a resumption of a grant made by the king: and this was usual in times past. Cot. Abr. Pres. 9.

(H 22.) Matters martial: — To what the authority of parliament is necessary.

By several statutes, none shall be charged to take arms himself, or to find men of arms, without authority of parliament, if he be not bound to it by tenure. 2 Inst. 528.

Nor, to go to war out of his county. Ibid.

Nor, to give wages to the conveyors of soldiers, nor to soldiers going to Scotland, Gascony, &c. which statutes are only declarations of the common law. 2 Inst. 528. Vide Wan, (B 6, 7.)

And the commons, 1 & 7 H. 5. made protestation, that they are not obliged to the maintenance of the king's foreign wars. 2 Inst. 528.

By the st. of right, 3 Car. (vide the st. 16 Car. 14.) none shall be obliged to quarter soldiers or mariners.

And no commissions shall issue to execute them by martial law. — It was done otherwise. 2 Car. Rush. 419.

And therefore, soldiers cannot be billeted upon any subject against his consent. 3 Rush. 1215.

(H 23.) Martial law.

So martial law cannot be used in England, without authority of parliament. 3 Rush. 1199. App. 76—81.

(H 24.) What the king may do by his prerogative.

To the king alone it belongs to make peace or war. Acknowledged by the commons. 19 Jac. Rush. 45. Vide Prærogative, (C 1.)

(H 25.) Matters marine.

The maintenance of the navy is a subject worthy of the parliament, and proper for it. 4 Inst. 50.

Vide Navigation, (I 1, &c.)

(I) In what method matters of parliament shall be treated.

The commons have a liberty to treat of matters in parliament, in what order they please. By the commons, 19 Jac. Rush. 53. But the king razed it out of the journal. Rush. 54.

Vide ante, (G 7, &c.)

(K) What things the parliament cannot do.

The parliament cannot by any act restrain the power of a subsequent parliament. 4 Inst. 42.

Nor, make a statute which a subsequent parliament cannot alter. 4 Inst. 42. Bac. H. 7.

So,

So, it cannot do any thing out of the limit of its jurisdiction : as, it cannot make a person inheritable in France. 2 Jon. 12.

Nor, make a determination upon an original petition, in a matter which does not come before them by error, &c. Skin. 523. Vide post, (L 1, &c.)

So, an act of parliament shall not change the laws of nature. And therefore if an act says, that a man shall be a judge in his own cause, it shall be void. Per Hob. 87.

Vide post, (L 85.)

## (L) Judicature of parliament.

(L 1.) Upon a writ of error : — When it lies.

A writ of error lies in parliament of a judgment in B. R. 4 Inst. 21.

But not of a judgment in C. B. 4 Inst. 22. Ha. J. P. 21.

The judicature of parliament is; 1. Upon a writ of error; 2. Upon an adjournment; 3. Upon an appeal; 4. Upon an accusation against a delinquent; 5. Upon a petition; 6. Upon privilege. Seld. Jud. Parl. 8. (3 vol. 1590.)

A writ of error lies in parliament of a judgment in B. R. in the exchequer, in the exchequer-chamber, in chancery, or before justices in eyre. Co. L. 71. b. 72. a. Vide Pleader, (3 B 6.)

And it shall be before the lords only, without the commons. R. 1 H. 7. 20. a. Hal. J. P. 19. R. 12 Co. 63.

Yet, a judgment there is virtually the judgment of the whole parliament. Vide Sal. 510.

But error does not lie in parliament upon a judgment in C. B. before it be affirmed or reversed in B. R. Seld. 3 vol. 2 P. 1526. Skin. 523.

(L 2.) How the proceeding shall be : — The petition.

Before error in parliament, there ought to be a petition, and a licence under the king's hand. Per Coke, 2 Bul. 162.

Upon a petition to the king in French or English, and his *fat justitia*, a writ of error goes to the Ch. J. of B. R. to remove the record *in præsens parlamentum*. 4 Inst. 21. 1 H. 7. 19. b. H. Parl. 18.

Then the Ch. J. brings the roll, and a transcript of it, to the house of lords, and there leaves the transcript, after it has been examined with the roll, and returns with the roll itself. 4 Inst. 21. 1 Rol. 14. 2 Bul. 162. Vide Pleader, (3 B 13.)

And with the transcript leaves the writ of error, and the bill or petition upon which it was allowed. 1 H. 7. 19. b.

And it is sufficient under the seal of Ch. J. though the writ of error commands the court to send the record *sub sigillo*. R. 1 Rol. 14.

(L 3.) Assignment of errors.

[Matter of fact cannot be assigned for error in the house of peers. Ld. Raym. 15.]

After the transcript is delivered by the Ch. J. into parliament, the plaintiff in error assigns his errors. 2 Sand. 224. (Vide 4 Inst. 21.)

And the errors ought to be in writing, and left with the clerk of the parliament. 1 H. 7. 19. b.

When errors are assigned in parliament, a *scire facias* issues against



the party, returnable at the same or a subsequent parliament. 4 Inst. 21. Seld. 3 vol. 2 P. 1526.

And the plaintiff shall show the errors in his bill upon which he prays the *scire facias*. 4 Inst. 22. Ha. J. P. 20.

#### (L 4.) Plea to the error assigned.

After errors assigned, the defendant shall plead *in nullo est erratum*. 2 Sand. 224.

Vide Pleader, (3 B 18, 19.)

If error in fact be assigned, it shall be sent to B. R. to be tried. Skin. 523.

#### (L 5.) Judgment.

The usage is, that the lords only in the upper house give judgment upon a writ of error. H. Parl. 19. Vide ante, (L 1.)

So, always where the commons are petitioners, the judgment shall be by the king and the lords. H. Parl. 26, 27.

And the lords ought to give the same judgment which ought to have been given by the court that gave the first judgment. Vide Pleader, (3 B. 20.)

And, therefore, if the lords, upon error in ejectment, reverse a judgment in B. R. given for the defendant, and that the plaintiff be restored, B. R. shall not give judgment, that the plaintiff recover his term; but before a *remittitur* entered upon the roll, application may be made to the lords to give a complete judgment. R. Ca. Parl. 57. 4 Mod. 127.

#### (L 6.) Adjournment to parliament.

So, by the common law, a case of difficulty might be adjourned into parliament *propter difficultatem*. Co. L. 72. a. 4 Inst. 105. 2 Inst. 408. Cot. Abr. 30.

And after a determination there, a writ shall be, commanding the judges to give judgment accordingly. Cot. Abr. 30.

By the st. 14 Ed. 3. 5. a prelate, two earls, and two barons shall be chosen every parliament, and commissioned by the king, to hear complaints of delays, or grievances in chancery, B. R., C. B., or exchequer, shall cause the judges of the court where the delay is to bring the process before them, and calling the chancellor, treasurer, justices, and barons, as they think fit, to assist them, shall make a good judgment, and send to the justices where the plea did depend, to give judgment accordingly. Seld. 3 vol. 2 P. 1530.

And if the case was of such difficulty as they could not determine it, they shall bring it to the next parliament, where accord is to be what judgment shall be given; which shall be sent to the judges, with command to proceed to judgment without delay.

By which statute, the adjournment to parliament in cases of difficulty was affirmed. Co. L. 72. a.

And remedy was also provided against delays in judgments. Ibid.

But this provision was only for intervals of parliament.

**(L 7.) Appeal to parliament ; when it lies.**

So, an appeal lies in parliament from a decree in chancery. Adm. Ca. Parl. 15. 17. 20.

And it lies as well, where by the decree the bill is dismissed, as where relief is given without cause. Ca. Parl. 18. 67. 69. 76.

And such appeals have been allowed without restraint, since 21 Jac. 1. Ca. Parl. 81.

They were allowed by the commons inter Skinner and East-India Company. Ca. Parl. 81. R. Cont. by the commons. Car. 2. and Ann.

And they are claimed by the lords, though a member of the house of commons be a party.

And Coke Ch. J. said, that a defect in a decree shall be redressed only by a reference to the justices, upon a petition to the king. 1 Rol. 831.

So, an appeal lies from a decree in chancery in Ireland to the lords of parliament here ; and not to the parliament in Ireland. R. Ca. Parl. 83.

So, it lies from a decree in chancery, upon exceptions to a decree by commissioners for charitable uses. Ca. Parl. 110.

So, it lies upon a decree by the delegates. Ca. Parl. 110. Quære ? Cont. 2 Ver. 118.

So, an appeal lies from a decree of the lords in the parliament in Ireland to the parliament of England.

But the lords of Ireland denied the jurisdiction of the lords in the parliament of Great Britain ; and, 25 Sept. 1715, voted that he who shall make such appeal shall be an enemy to his country.

[Vide the st. Geo. 5. which declares that the house of lords of Ireland have no jurisdiction to judge of, affirm, or reverse any judgment, &c. there.]

But an appeal does not lie to parliament upon a decree in chancery upon the statute for charitable uses ; for by the statute no jurisdiction is given but to the chancery. 2 Ver. 118.

[Nor, from an order of the lord chancellor (entrusted with the care of idiots and lunatics, by the king's sign manual) touching a lunatic, but to the king in council. 3 P. W. 108.]

After an appeal to parliament, if the parliament be prorogued, the chancery shall proceed in the account. 1 Ver. 344.

**(L 8.) Accusation in parliament : — When necessary.**

The parliament will not proceed to judgment against a delinquent without the accusation of somebody. Seld. Jud. Parl. 11. (3 vol. 2 P. 1591.)

For they cannot be accusers and judges. Seld. Jud. Parl. 11. (3 vol. P. 1591.)

So, they cannot join with the commons or others in an accusation. Seld. Jud. Parl. 12. (3 vol. 2 P. 1591.)

A peer cannot be indicted in parliament. Seld. Jud. Parl. 40. (3 vol. 2 P. 1602.)

## (L 9.) How it shall be made : — By appeal.

There are four manners of accusation in parliament ; 1. By appeal ; 2. By complaint, or petition ; 3. By information of the attorney-general ; 4. By the commons ; and this by way of complaint, or impeachment. Seld. Jud. Parl. 11. (3 vol. 2 P. 1519.)

One peer might appeal another peer in parliament for treason, &c. and thereupon deliver his gantlet and gages for his proof, and pray an answer, and, for default, judgment. Seld. Jud. Parl. 82. (3 vol. 2 P. 1634.)

But now, by the st. 1 H. 4. 14. such appeals are abolished.

And also all impeachments or accusations originally by one peer against another. R. by the judges, and afterwards by the lords, 14 July 1663. Life of Clar. 215 — 222.

(L 10.) By complaint : — *Ex parte regis, &c.*

A complaint may be the foundation of a proceeding in parliament. 1. *Ex parte regis.* 2. *Ex parte dominorum.* 3. On the part of the commons. 4. Upon the complaint or petition of a private person. (Vide Seld. 3 vol. 2 P. 1591.)

As, if a peer petition the king, and by the king's command it is referred to the parliament ; the lords will proceed upon it, without an information, or other foundation. Seld. Jud. Parl. 54. (3 vol. 2 P. 1599.)

So, by the king's command, the parliament may proceed against a peer upon a process against him in another court ; as, in the court of chivalry. Seld. Jud. Parl. 57. 33. (3 vol. 2 P. 1609.)

So, upon an indictment before commissioners removed into chancery, and by *mittimus*, to parliament. Seld. Jud. Parl. 40. 59. (3 vol. 2 P. 1606.)

How proceedings shall be upon a complaint to the lords by the commons, vide post, (L 14, 15.)

## (L 11.) By a private subject.

A complaint by a private person is not usual for a public misdemeanor, except where he has an interest in it. Seld. Jud. Parl. 66. (3 vol. 2 P. 1612.)

As, articles were exhibited by the earl of Bristol against the duke of Buckingham and lord Conway, in the house of peers, for a misdemeanor. 1 Rush. 262. 264.

Articles were exhibited by the lords and others of the privy council, and two judges, to the king, against cardinal Wolsey. 4 Inst. 89.

But a complaint in parliament originally by a private subject, peer, or commoner, against another, for a misdemeanor, as well as for treason, is now illegal, if it be not by license of the king, or by his attorney-general. Life of Clar. 223.

Yet upon complaint, that such a one has abused the house, or any peers, the house may examine it, and inflict a punishment, as to them seems good.

Upon examination it appeared, that one combined to charge an innocent person for words in slander of the house ; he was fined, imprisoned,

prisoned, and set in the pillory by order of the peers, without trial by a jury. 2 Mod. Ca. 340.

(L 12.) By information.

An information may be exhibited to the parliament by the king's attorney-general for high treason. Seld. Jud. Parl. 34. 47. (3 vol. 2 P. 1600. 5, 6.)

So, for any misdemeanor.

An information by the attorney-general shall be exhibited *ex officio*.

Or, by command of the lords, upon a complaint of the commons, &c. to examine them. Seld. Jud. Parl. 14. 33. 62. (3 vol. 2 P. 1592. 1599.)

(L 13.) By indictment.

So, if an indictment be against a peer in B. R. for murder or other capital crime, it may be removed to the house of peers by *certiorari*, and there the proceedings shall be upon it.

[A peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same, according to the provisions of the act 25 G. 2. Fost. 138.]

[If the day appointed by the judgment for execution should lapse before such execution done, (which however the law will not presume,) a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, or by the court of B. R., the parliament not then sitting; the record of the attainder being properly removed into that court. Ibid.]

Vide post, (L 16.)

(L 14.) By accusation of the commons: — By petition.

So, the commons may exhibit an accusation to the lords in parliament, by petition or impeachment. (Vide Seld. 3 vol. 2 P. 1591.)

The commons may exhibit a complaint in general by petition, without naming any person in particular: as, a complaint of the farmers of the customs for extortion. Seld. Jud. Parl. 12. (3 vol. 2 P. 1591.)

(L 15.) How it shall be proceeded upon.

Upon such complaint by the commons, the lords may order that the merchants, &c. against whom the complaint was, be summoned, and their answer heard. Seld. Jud. Parl. 13. (3 vol. 2 P. 1592.)

If upon an examination of a complaint any one appears criminal, he shall be arraigned at the suit of the king; for when an accusation by the commons is general, it is not the suit of the commons, but of the king. Seld. Jud. Parl. 14. (3 vol. 2. P. 1592.)

Or, the commons may afterwards impeach the parties discovered. Seld. Jud. Parl. 14. (3 vol. 2 P. 1592.)

(L 16.) Arraignment: — A peer, how tried.

For high or petit treason, or felony, or misprision of treason, a peer shall

shall be tried by his peers in parliament, upon an impeachment. Vide Rush. 268. Vide Dignity, (F 1, 2.)

So, upon an indictment, if the king constitutes an high steward. 4 Inst. 23. 2 Inst. 49. H. Parl. 23.

And the lords are judges whether it be treason or not. 4 Inst. 23.

But the bishops shall not be present. Ibid. Sta. 153. a. 10 Ed. 4. 6. b.

And the number of peers present ought to be twelve or more. 2 Inst. 49. Sta. 153. b. 3 Inst. 28. 30.

The trial *per pares* is of great antiquity. It was 8 W. 1. 2 Inst. 50.

The queen consort, or dowager, shall be tried *per pares*. Ibid.

So, all women, noble by birth, or marriage, unless since the marriage, they have married under the degree of nobility. Ibid. By the st. 20 H. 6. 9.

But for offences under treason, felony, or misprision, a peer shall be tried by a jury. 2 Inst. 49.

So, upon an appeal. Ibid.

So, one of the nobility of another kingdom. 3 Inst. 30.

So, all under the degree of nobility, for treason or felony. By the st. 4 Ed. 3. 2 Inst. 50.

And the indictment shall be found by a jury. 2 Inst. 49. 3 Inst. 28.

And if the indictment be found against a peer in B. R., or removed thither, he may plead a pardon before the justices there, though he shall not confess, nor plead not guilty before them. 2 Inst. 49.

So, if upon an indictment he does not appear, process shall go to an outlawry; and he shall be outlawed *per judicium coronatorum*. Ibid.

So, by the st. 25 Ed. 3. st. 5. 2. for high treason, every one ought to be tried by people of his condition.

And where the st. 35 H. 8. 2. provides for the trial of treason, or misprision of treason in B. R., or upon a special commission in a county where the king assigns, it was enacted that a peer, in such case, shall have his trial by his peers.

So, by the st. 1 & 2 Ph. & M. 10. (which provides, that all trials for treason shall be had according to the due course of the common law), it was provided, that a peer indicted should answer the same indictment, and have his trial by his peers.

So, by the st. 5 El. 1 & 11., 13 El. 2., 18 El. 1., and 23 El. 1. for treasons by those statutes.

So, by the st. 27 El. 2. and 3 Jac. 4. for treasons made by those statutes.

So, it shall be in all cases, where a new treason, or felony, is made by a statute, though the statute does not expressly provide for it. Sta. 153. b.

A peer cannot waive his trial by his peers, and consent to be tried by a jury. R. Kelg. 56. Vide Dignity, (F 1, 2.)

And if he will not put himself upon his peers, judgment shall be against him as a traitor. Kelg. 57.

[Every proceeding in the house of peers, acting in its judicial capacity, is a proceeding before the king in parliament, and the house is the court of our lord the king in parliament.]

[It is founded on immemorial usage, and is part of the original constitution.]

[It

[It is open for all purposes of judicature during the continuance of the parliament; it openeth and shutteth with the session, as B. R. with the term.]

[Its authority is independent of any special powers derived from the crown.]

[On the trial of a peer before it, for a capital offence, whether on impeachment or indictment, it is the same court, whether an officer with the title of steward of England, is appointed to preside during trial, and until judgment, or not, though usual and expedient to make such appointment.]

[Every peer votes on law as well as fact; the majority determines. The high steward votes only as a peer.]

[It acteth in its judicial capacity, in every order touching the time and place of trial, putting it off from time to time, allowing counsel or not, &c. all before the appointment of high-steward; it has directed in what manner, and by what form of words, he should be appointed, [Lörd Danby, and the five lords. Lord Lovat.] therefore its existence cannot depend on that appointment. It has received and recorded a prisoner's confession, which amounts to a conviction before his appointment; [Lord Derwentwater.] it has allowed prisoners the benefit of acts of general pardon, [Lord Carwath, Widdrington, Salisbury.] without the appointment of a high-steward, and after the commission dissolved.]

[The lords, on 12 May 1679, (on the proceedings against lord Danby and the five popish lords,) declared that the office of high-steward upon trial of peers on impeachments, is not necessary to the house of peers, but that they may proceed in such trial, if an high-steward is not appointed.]

[The commission then running thus, "*ac pro eo quod officium seneschalli Angliæ (cujus presentia in hac parte requiritur) ut accepimus jam vacat;*" it was apprehended this implied the necessity of a high-steward; and therefore by the committees of the lords and commons it was agreed the commission should be recalled, and a new commission issue, with these words instead of them; *ac pro eo quod proceres et magnates in parlamento nostro assemblati nobis humiliter supplicaverunt, ut seneschallum Angliæ pro hac vice constituere dignaremur.*— And all commissions since, on impeachments, have been in the same form.]

[The commissions still run in the first form, on indictments, but the lords declare that the appointment of a high-steward alters not the nature of the court, which still remains the court of peers in parliament: this applies to indictments as well as impeachments.]

[The commission recites that A. is indicted, that the king intends he should be judged before himself in this present parliament; that the office of steward (whose presence is required on this occasion) is vacant; and appoints B. steward for this time to execute the office, with all things due in that behalf.]

[This does not constitute a court of the high-steward, a right of judicature, which the commission supposes to be in a court then subsisting before the king in parliament; he is to preside as speaker or chairman during trial, and till judgment; and in that respect, and no other, his presence is required.]

[On indictments, before the high-steward is appointed, they order  
certio-

*certiorari* to remove them. It is made returnable before the king in parliament; it is received and read. They construe acts of parliament relating to the conduct of the court and the right of the subject at the trial, and make resolutions thereupon. Lord Kilmarnock's case.]

[Therefore, though the office of high-steward determines before execution done according to the judgment, yet the court of peers in parliament, where that judgment was given, subsists for all purposes of justice during the sitting of the parliament, and may therefore appoint a new day for execution. Foster, 138.]

[Vide ante, (L 13. Officer, E 5.)]

[Peers tried in full parliament are entitled to the benefit of 7 W. 3. c. 3. in its full extent. Foster, 149. 247.]

(L 17.) What number of peers shall be required. Vide Dignity, (F 1, 2.)

By the common law, twelve at least of the peers ought to be present: for a verdict by a less number of peers would not be good. R. Mo. 622.

And if more peers are present, the verdict shall be by the major part, so that twelve, at least, agree to it. Kelg. 56. R. Mo. 622.

And therefore it was usual to have twenty-three peers at a trial, at least. Kelg. 56.

And to authorise the high-steward to summon which peers he pleases. Mo. 621.

But now, by the st. 7 W. 3. 3. on every trial of a peer or peeress, all the peers shall be summoned twenty days at least before trial; and every one appearing (having taken the oaths, &c.) shall have a vote.

Provided, that the said act extend not to impeachments, or other proceedings in parliament in any kind.

[All the peers and spiritual lords are summoned, though the trial is in full parliament. Foster, 247.]

[But summoning the peers is not absolutely and indispensably necessary. D. per Foster J.; for the act provides, that every peer so summoned and appearing shall vote in the trial, which must mean throughout the trial, and bishops cannot vote to condemn or acquit. Foster, 248.]

A peer cannot challenge any peer by whom he ought to be tried. R. Mo. 621, 622. Kelg. 54 in marg.

And, therefore, a peer shall be a trier, though he was a commissioner of oyer and terminer, before whom the indictment was taken. R. Kelg. 58.

(L 18.) Upon an impeachment process against him.

If a person, charged in parliament with a crime or misdemeanor, be absent, a writ shall be directed to the sheriff to summon him. 4 Inst. 39.

Or, to the party himself. 4 Inst. 39. Seld. Jud. Parl. 106. (3 vol. 2 P.)

If the party cannot be found, there shall be a writ to the sheriff to arrest all his goods and chattels. Seld. Jud. Parl. 23. 99. (3 vol. 2 P. 1596. 1624.)

If the party does not yet appear, there shall be a proclamation through-

throughout all the kingdom, that he appear, otherwise such judgment will be given against him. *Seld. Jud. Parl.* 95. (3 vol. 2 P. 1621.)

So, sometimes an act of parliament shall be made, that if he does not surrender himself before such a day, he shall be attainted.

(L 19.) In what manner impeached.

A peer may be impeached in parliament by articles exhibited at the suit of the king by the attorney-general; as, against the earl of Bristol. *Rush.* 249. *Vide ante*, (L 12.)

By articles exhibited by another peer. *Rush.* 254.

[One peer cannot exhibit to the house of lords a charge of high treason against another peer. *R. 1 Chandl. Lords*, 59. 64.]

So, the commons may, by parol, charge a peer before the king and lords. *Seld. Jud. Parl.* 24. (3 vol. 2 P. 1596. 1598, 1599.)

Or a commoner. (*Vide Seld.* 3 vol. 2 P. 1598, 1599.)

So, before the lords at a conference. *Seld. Jud. Parl.* 30, 31, 32. (3 vol. 2 P. 1598, 1599.)

The right of impeachment by the commons was allowed by the lords. 20 June 1701.

Upon an impeachment by parol, the lords by their committee may draw a particular charge, and deliver it to the party accused. *Ibid.*

Or, the commons, by a committee, may draw a particular charge, and send it to him. *Ibid.*

Or, the party, being a peer, upon report of a conference, may make answer. *Ibid.*

But the most usual proceeding is, to send impeachment by some member to the bar of the lords, and afterwards to exhibit articles. *Ibid.*

(L 20.) In what form.

In the proceedings upon an impeachment by the commons, a member attends with others at the bar of the lords, there, in the name of all the commons of England, impeaches such an one, and acquaints the house, that the commons, in due time, will exhibit particular articles against him, and maintain them. *Lords' Journ.* 1. 15 Ap. 1701.

Though the commons impeach only for a particular grievance, they may afterwards exhibit other articles against him. *Seld. Jud. Parl.* 21. (3 vol. 2 P. 1595.)

And the delivery of articles is not necessary till the party appears. *Seld. Jud. Parl.* 23. (3 vol. 2 P. 1596.)

Except where the commons will file them upon record before. *Seld. Jud. Parl.* 24. (3 vol. 2 P. 1596.)

(L 21.) Articles of impeachment.

If articles are not exhibited against the lord impeached, the lords by message remind the commons of it. *Lords' Journ.* 5 May 1701. 15 May 1701. 4 June 1701.

But the commons are judges of the proper time for exhibiting them. 31 May 1701.

Yet the lords claimed a power to limit the time. 4 June 1701.

When the articles are prepared, a member carries them to the lords. 9 May 1701. *Lords' Journ.*

But



But they are not read by the commons at the bar. Lords' Journ. 9 May 1701.

Articles of impeachment need not pursue the strict forms of law. Seld. Jud. Parl. 22. 27. (3 vol. 2 P. 1595. 1597.)

After the articles are read, a copy of them is prayed, and awarded to the lord impeached. Lords' Journ. 9. 24. Ray. 382.

And a day given to him to answer. Ray. 382.

### (L 22.) When committed upon articles, or not.

In an impeachment for a misdemeanor, the lord impeached does not find security. Lords' Journ. 9 May 1701. Seld. Jud. Parl. 101. (3 vol. 2 P. 1624.)

Nor, shall be committed upon common fame, without a special matter against him. Seld. Jud. Parl. 29. (3 vol. 2 P. 1598.)

Nor shall be committed, whether he be a peer or a commoner, till judgment against him. Seld. Jud. Parl. 98. (3 vol. 2 P. 1624.)

So, a peer may continue in his place, except upon debate of his own cause, till judgment. Seld. Jud. Parl. 98. 101. (3 vol. 1624, 1625.)

But, where an impeachment is for a capital offence, he shall be committed to custody. Seld. Jud. Parl. 97. (3 vol. 2 P. 1624.)

Yet, the commitment will sometimes be omitted, at the discretion of the lords. Ray. 382.

And where an impeachment is for high treason, generally, without special matter, it is usually omitted. It was omitted in the case of lord Clarendon, though the commons complained of it. Life of Clar. 251—302.

So, if a commoner be impeached for a misdemeanor, upon his answer, he may be required to find surety for his attendance. Seld. Jud. Parl. 98. (3 vol. 2 P. 1624.)

And he may be committed for his refusal, or till bail. Ibid.

So, if he be in custody before impeachment, he shall answer there. Seld. Jud. Parl. 101. (3 vol. 2 P. 1625.)

So, if committed for treason, he may be bailed by the lords, with the king's licence. Semb. Life of Clar. 253. 257.

### (L 23.) Answer.

After answer by a lord impeached, a copy of it is made, and sent to the commons. Lords' Journ. 14. 24.

Then the lord impeached may petition for counsel. Lords' Journ. 3 Jan. 1680.

And for his trial.

The answer does not observe any strict form. Rush. 274.

He may submit himself to the king's mercy. (Seld. 3 vol. 2 P. 1419.)

Or, plead not guilty to the whole.

Or, an act of pardon as to one article, and not guilty to the residue. 3 Rush. 1374.

### (L 24.) Replication, &c.

After answer, the commons join issue by replication. 23 May 1701.

And

And may consider whether they will reply or not. Seld. Jud. Parl. 199. (3 vol. 2 P. 1628.)

If the commons delay a replication, the lords\* remind them of it. 21 May 1701.

But upon an information *ex parte domini regis*, the commons cannot reply, or demand that the defendant shall be put to his answer. Seld. Jud. Parl. 109. (3 vol. 2 P. 1628. 1631. 118.)

So, upon an impeachment if the commons do not reply, the lords may. Ibid.

So, to the replication, the defendant may rejoin, &c.

After issue joined in capital cases, sometimes a committee has been appointed of both houses, viz. lords and commons, to adjust the preliminaries of the trial.

Sometimes omitted.

And in the case of a misdemeanor, refused, though desired by the commons. 6, 10, 17 June 1701.

#### (L 25.) Witnesses.

The witnesses are sworn in the house, and examined by a committee upon interrogatories agreed in the house, or at the discretion of the committee. Seld. Jud. Parl. 123. (3 vol. 2 P. 1632.)

Or, are examined *vivâ voce* at the bar, upon the trial. 16 June 1701.

If witnesses are examined upon interrogatories, the party accused shall have a copy of the depositions *pro* and *con.*, after publication, in convenient time before the hearing. Rush. 267.

If examined *vivâ voce*, the impeached lord may cross-examine. 16 June 1701.

#### (L 26.) Trial.

After issue joined, a day shall be appointed for the trial of the impeached lord.

And the lords claim a power to appoint what day they please, though the commons insist, that there ought to be a previous signification of their assent. 4 & 9 June 1701.

And to do justice by the acquittal, or condemnation of the peer, in a reasonable time. 20 June 1701.

At the trial, the articles shall be read, and then the answer, and then the evidence. 16 June 1701.

A lord, being a witness, shall be sworn by the chancellor at the table, and shall give his evidence in his place. Ibid.

A commoner shall be sworn by the clerk, at the bar, and there shall give his evidence. Ibid.

The commons ought to be present before the peers; and none shall be covered but a peer. Ibid.

If a peer or manager for the commons, would have any question, he ought to pray that the chancellor ask it. Ibid.

If a doubt arises at the trial, no debate shall be in court; but it shall be adjourned to the house. Ibid.

If several are impeached, the commons may proceed as they please; and therefore, they may try which they will first. 4 & 9 June 1701.

No

No peer impeached for a misdemeanor, ought to be without the bar. R. 12 June 1701.

Nor shall be precluded of his vote in any case, except his own trial. 12 June 1701.

(L 27.) When counsel &c. allowed.

A peer shall have counsel in a cause criminal, or capital. R. Rush. 268.

In all cases of misdemeanor. Seld. Jud. Parl. 103, &c. (3 vol. 2 P. 1625; 1626, &c.)

And the counsel assigned has been imprisoned for refusal. 1 Clar. 379.

So, the defendant in a case of misdemeanor, shall have a copy of the articles. Semb. Seld. Jud. Parl. 107. (3 vol. 2 P. 1627.)

But in an impeachment for treason, or felony, counsel has not been allowed. Seld. Jud. Parl. 102, &c. (3 vol. 2 P. 1625, 1626, &c.)

Yet, in these cases counsel may be allowed at the discretion of the lords. Ray. 382.

[By st. 20 G. 2. c. 30. all persons impeached of high treason, whereby corruption of blood, or for misprision of it, shall make their full defence by two counsel.]

(L 28.) Causes of impeachment: — For treason.

The duke of Suffolk was impeached for high treason, 28 H. 6. Vide Art. 1, 2, 3. Seld. Jud. Parl. 27. (3 vol. 2 P. 1597.)

For high treason in subverting the fundamental laws, and introducing arbitrary power, Lord Finch, Sir Robert Berkley, Lord Strafford. 2 Rush. 606. 3 Rush. 1365. (Vide Rush. part 3. vol. 1. 136.)

(L 29.) For neglect of office: — As an ambassador.

The duke of Suffolk was impeached, 28 H. 6. for that, being ambassador, he consented to the delivery of divers towns to the king of France, without the privity of the other ambassadors. Vide Art. 4. (Vide Seld. 3 vol. 2 P. 1597.)

The earl of Bristol, that he, being ambassador, gave false informations to the king. 1 Rush. 249.

That he did not pursue his instructions. Art. 2. 1 Rush. 250.

That he pursued his embassy for his own profit only. Art. 4. 1 Rush. 250.

Cardinal Wolsey, that he made a treaty between the pope and the king of France, when ambassador to H. 8. without the privity of his king. 4 Inst. 89. 156.

That he joined himself with the king. 4 Inst. 90.

(L 30.) Privy councillor.

The earl of Bristol was impeached, 2 Car. that he counselled against a war with Spain, when that king affronted us, to the dishonour and detriment of the realm. Art. 3. 1 Rush. 250.

That he advised a toleration of papists. 1 Rush. 251.

That he enticed the king to popery. 1 Rush. 252. 262.

Michael de la Poole was impeached, 10 R. 2. that he incited the king to act against the advice of parliament. Seld. Jud. Parl. 25. (3 vol. 2 P. 1596.)

The Spencers, that they gave bad counsel to the king. 4 Inst. 54.

The earl of Orford, that he advised a prejudicial peace. 8 May 1701.

Lord Finch, that he, being speaker of the commons, refused proceeding in the house.

(L 31.) Admiral.

The duke of Buckingham was impeached, for that he, being admiral, neglected the safeguard of the sea. Rush. 308.

The earl of Orford, that he hazarded the navy, and had neglected to take ships of the enemy. 8 May 1701.

(L 32.) Chancellor.

Michael de la Poole was impeached, that he, being chancellor, acted contrary to his duty. Seld. Jud. Parl. 26. (3 vol. 2 P. 1596.)

Lord Somers, that he ratified a peace, not approved by the parties concerned, under the great seal. 16 May 1701.

That he put the great seal without warrant. Ibid.

And to a blank commission. Ibid.

That he made unlawful and irregular decrees and orders, and a delay of justice. Ibid.

Michael de la Poole was impeached, that he purchased lands of the king, which he had procured to be surveyed under their value. Seld. Jud. Parl. 24. (3 vol. 2 P. 1596.)

For a fraudulent purchase from the king. Seld. Jud. Parl. 26. (3 vol. 2 P. 1596.)

So, John Lord Somers. 16 May 1701.

(L 33.) For purchasing, or having a plurality of offices.

The duke of Buckingham was impeached for plurality of offices. 2 Car. Rush. 306.

For purchasing of offices. Rush. 306. 334.

The earl of Orford, for exercising incompatible offices. 8 May 1701.

So, the lord Halifax. 9 June 1701.

(L 34.) For malefeazance to the king.

The duke of Buckingham was impeached for giving a medicine to the king without advice of the physicians. Rush. 351.

(L 35.) To the public good.

So, the Spencers, father and son, were impeached, for that they prevented the great men of the realm from giving their counsel to the king except in their presence. 4 Inst. 53.

That they put good magistrates out of office, and advanced bad. Ibid.

The earl of Orford was impeached, that he encouraged pirates. 8 May 1701.

(L 36.) For procurement of illegal patents.

Sir G. Mompesson was impeached for the procurement of patents of monopoly. 18 Jac. Rush. 24. 27. Seld. Jud. Parl. 31. (3 vol. 2 P. 1598.)

## (L 37.) For corruption in office.

Lord Bacon, chancellor, was impeached for bribery. 18 Jac. Rush. 28. Seld. Jud. Parl. 31. (3 vol. 2 P. 1599.)

The duke of Buckingham, for the sale and purchase of offices. Rush 334.

The lord Finch for unlawful methods of enlarging the forest, when assistant to the justices in eyre. Art. 3. (Vide Rush. part 3. vol. 1. 137.)

For threatening other judges to subscribe to his opinion. Art. 4, 5, 6. Ibid.

For delivering opinions which he knew to be contrary to law. Art. 7. Ibid.

For drawing the business of the court to his chamber. Art. 8. Ibid.

## (L 38.) For oppression or deceit.

So, an impeachment was exhibited for several extortions and deceits to the public. Seld. Jud. Parl. 19. (3 vol. 2 P. 1594, 1595.)

An article was exhibited against cardinal Wolsey, for exercising legatine authority to the prejudice of the prerogative, and oppression of ordinaries, and houses of religion. 4 Inst. 89.

So, against the earl of Orford for converting the public money to his own use, without account. 8 May 1701.

## (L 39.) For regard to private interest.

So, an impeachment was against the earl of Orford, that he procured from the king to himself, exorbitant grants in lands and money. 8 May 1701. — So, against lord Somers. 16 May 1701.

For taking money, &c. from a foreign prince without giving an account for it. 8 May 1701.

For selling goods, taken as admiral, for his own use, without accounting for a tenth to others. 8 May 1701.

Lord Halifax, for obtaining grants of estates forfeited for rebellion. 9 June 1701.

For obtaining grants of money when there was a war and heavy taxes. Ibid.

And grants out of the king's woods. Ibid.

## (L 40.) Judgment upon an impeachment: — By whom it shall be demanded.

In a prosecution by the commons upon an impeachment, &c. it belongs to the commons to demand the judgment. Seld. Jud. Parl. 132, 133. 162. 176. (3 vol. 2 P. 1648. 1653.)

And they ought to be present at the answer or judgment given. Seld. Jud. Parl. 158. (3 vol. 2 P. 1647.)

And this always upon a judgment in capital cases, though it be not upon their accusation. Ibid.

So, judgment upon an information shall be demanded by the king's counsel. Seld. Jud. Parl. 176. (3 vol. 2 P. 1653.)

But upon a judgment by the lords for a misdemeanor, the commons need not be present, unless it be upon their impeachment. Seld. Jud. Parl. 162. (3 vol. 2 P. 1649.)

(L 41.)

## (L 41.) By whom given.

Judgment upon an accusation in parliament belongs to the lords only. Seld. Jud. Parl. 133. (3 vol. 2 P. 1637.) Hard. 155.

And it is sufficient that a majority of the lords be present in person or by proxy. Seld. Jud. Parl. 144. (3 vol. 2 P. 1641.)

In cases of misdemeanor, the judgment shall be by the lords spiritual as well as temporal. Seld. Jud. Parl. 136. 148. (3 vol. 2 P. 1638. 1643.)

And after debate between them, the chancellor, &c. put the question to the youngest baron, and so to each *seriatim*, who answers "content" or "not content." Seld. Jud. Parl. 167. (3 vol. 2 P. 1650.) Vide Dignity, [F 2.]

Judgment in capital cases shall be pronounced by the high-steward. Seld. Jud. Parl. 177. (3 vol. 2 P. 1653.) Vide Dignity, (F 2.)

In cases of misdemeanor, by the chancellor. *Ibid.*

But in capital cases, the lords temporal only are judges. Seld. Jud. Parl. 136. 149, &c. (3 vol. 2 P. 1638. 1643.)

And the lords spiritual cannot vote in any matter relating to it. Seld. Jud. Parl. 150. &c. (3 vol. 2 P. 1743, 1744, &c.)

And usually absent themselves from the house when a capital offence is prosecuted and debated before the parliament. *Ibid.*

Yet their absence from the house is not necessary. Semb. Seld. Jud. Parl. 153. (3 vol. 2 P. 1646.)

[Lords spiritual may vote in all previous questions, in a proceeding in full parliament in a case of blood. Lords' Journal, 13 & 14 May 1672. Fost. 248.]

[Lords spiritual never were or could be summoned on a court of the high-steward; for there, in all points of law and practice, he giveth the rule as sole judge in the court. Fost. 248.]

[The st. 7 W. 3. c. 3. does not give the lords spiritual any right in cases of blood which they had not before. *Ibid.*]

And a bishop may officiate as speaker of the lords during the trial, &c. Seld. Jud. Parl. 156. (3 vol. 2 P. 1646.)

So, the judges ought to be present upon all trials for capital offences, for their advice. Seld. Jud. Parl. 164. (3 vol. 2 P. 1649.) Vide ante, (D 18.)

## (L 42.) The king's assent, when necessary.

So, to the judgment of the lords, in capital cases, the king's assent is requisite. Seld. Jud. Parl. 136. 138. &c. (3 vol. 2 P. 1486. 1638, 1639, &c.)

But the king's assent is sufficient, though the king be absent, if he signifies his assent. Seld. Jud. Parl. 143. (3 vol. 2 P. 1641.)

Though the king be absent at the trial, debate, &c. Seld. Jud. Parl. 146. (3 vol. 2 P. 1642.)

So, in judgment for a misdemeanor, the king's assent is not necessary. Seld. Jud. Parl. 144. (3 vol. 2 P. 1641.)

So, it will be good, though the king dissents. Semb. Seld. Jud. Parl. 145. (3 vol. 2 P. 1642.)

(L 43.) What the judgment shall be : — In capital cases.

The judgment by the lords in capital cases strictly pursues the law of the land. Seld. Jud. Parl. 168. (3 vol. 2 P. 1650, 1651.)

And cannot omit any thing material. Ibid. 169.

Nor add any thing to it. Seld. Jud. Parl. 170.

But the form of the judgment for the same offence at common law is not necessary. Ibid. 169.

And for treason in surrendering of castles, judgment for beheading only was given. Seld. (3 vol. 2 P. 1486.)

(L 44.) Judgment by the lords, upon an impeachment for a misdemeanor.

The lords for a misdemeanor have pronounced sentence of perpetual imprisonment. 18 Jac. Rush. 28.

Imprisonment at the king's pleasure. Seld. Jud. Parl. 171. (3 vol. 2 P. 1652.) 3 Inst. 148.

Fine and ransom ; as sir G. Mompesson. 18 Jac. Rush. 28. Ld. Bacon. Rush. 31. Seld. Jud. Parl. 171. (3 vol. 2 P. 1488. 1652.) 3 Inst. 148.

Forfeiture of goods and lands for life, upon sir G. Mompesson. 18 Jac. Rush. 28. Seld. 3 vol. 2 P. 1518.

Incapacity of office, &c. upon sir G. Mompesson. 18 Jac. Rush. 28. and Ld. Bacon. Rush. 31. Seld. 3 vol. 2 P. 1497. 3 Inst. 148.

Incapacity to come near to the king's court, upon sir G. Mompesson. 18 Jac. Rush. 28. 3 Inst. 148.

That he be infamous and may not be of a jury, &c. upon Sir G. Mompesson. 18 Jac. Rush. 27.

That he be degraded of knighthood. Sir G. Mompesson. 18 Jac. Rush. 27.

That he be not pardoned by the king. Ibid.

Perpetual banishment. Sir G. Mompesson. 18 Jac. Rush. 28. Seld. 3 vol. 2 P. 1505.

That he make satisfaction to the party oppressed, &c. Seld. Jud. Parl. 173. (3 vol. 2 P. 1652.)

That his fraudulent purchase shall be annulled. Ibid. 174.

So, if he be a peer, that he never shall take his seat in parliament. Lord Treasurer, M. 3 Inst. 148.

(L 45.) Execution.

After judgment in capital cases, it shall be commanded to the earl marshal to do execution, and to the mayor, aldermen, and sheriffs of London, the constable of the Tower, &c. to be assistant. Seld. Jud. Parl. 182. (3 vol. 2 P. 1659.)

If he be a commoner, to the marshal. Ibid. 183.

And it shall be in the power of the king alone to order execution to be done.

Or, the lords may issue a warrant for execution.

So, the king may remit all the parts of the judgment, except the beheading. Adm. 23 Dec. 1680.

If judgment against a peer for a misdemeanor be, that he be imprisoned,

prisoned, the gentleman-usher shall have charge to conduct him to the prison. Ibid. 185.

If against a commoner, the serjeant at arms attending the great seal. Ibid.

And it shall be commanded to the constable of the Tower, &c. to receive the body. Ibid.

If judgment be for damages, the lords may appoint how they shall be levied. Ibid. 187.

If they do not appoint a remedy, it shall be in chancery, and not elsewhere. Ibid.

By the st. 12 & 13 W. 3. 2. no pardon under the great seal shall be pleadable to an impeachment by the commons in parliament. Vide post, (L 46.)

(L 46.) When a person impeached shall be discharged : —  
By pardon.

If the offence for which he is impeached be pardoned by an act of pardon, the pardon may be pleaded before the lords. Sho. 100.

And it ought to be there pleaded, for if he be sent to B. R. by *habeas corpus*, the court will not take consance of it, when the commitment was judicially by the lords. R. Sho. 100. Carth. 132.

Though the parliament be adjourned or prorogued. Vide Carth. 132. Sho. 100.

But by the st. 12 & 13 W. 3. 2. no pardon under the great seal is pleadable to an impeachment by parliament.

Nor, before this statute. Dub. Hard. 155.

If an attainder be by the common law, for high treason, by the st. 33 H. 8. 20. it shall be of the same effect and advantage to the king, as if it was an attainder by act of parliament.

And by the st. 29 El. 2. an attainder for high treason, where the party is executed, shall not be reversed for error.

If the attainder be confirmed by parliament, a petition for mercy ought to be exhibited to the parliament. H. Parl. 19.

(L 47.) Recognizance taken by parliament.

So, the parliament has authority to take a recognizance *sedente parlamento*. 1 H. 7. 20. a.

(L 48.) Where the lords have no original jurisdiction.

[The lords have no original jurisdiction in any case. Semb. Ld. Raym. 15.]

But the lords in parliament have no original jurisdiction of any matter mixed with fact; for it ought to come to them *gradatim*, for they are the last resort. Sal. 511.

And therefore, they cannot determine originally the right to goods or inheritance. Sal. 512.

Vide ante, (K).

(M) Continuance of parliament.

If the king will not have the parliament begin at the return of the writ of summons, it may be continued by writ till another day. 1 And. 295. Vide ante, (E 1.) — post, (N—O 1, 2. — P. 1, 2.)



## (N) Adjournment of parliament.

The house of commons is a distinct court, and is not adjourned by the adjournment of the upper house. 4 Inst. 26.

And this house, by the speaker, with the assent of the house, adjourns itself. 4 Inst. 22. H. Parl. 39.

The king claimed the sole power to adjourn the parliament. 18 Jac. Rush. 35. But it was disallowed by the commons. 4 Car. Rush. 537.

But the king, by letters patent, may adjourn the parliament after the sessions begun, as well as the house itself: and by such adjournment all matters continue undetermined. D'Ew. 318. 345.

And so it was 27 El. Vide the form of the letters patent. D'Ew. 318.

And such adjournment may be by commissioners, as it was 28 & 29 El. D'Ew. 382. 4 Inst. 7.

Or, by the king in person. D'Ew. 551.

So, the king, by the speaker, commanded, that the house be adjourned to a subsequent day. 2 Rush. 608.

Yet, an adjournment of the upper house by the chancellor, with the command and in the presence of the king, is not an adjournment of the house of commons. D'Ew. 550. 621.

Or, by the king himself. D'Ew. 551.

*A fortiori*, if by the chancellor, without the special command of the king. Ibid.

So, the speaker ought not to adjourn the house by the king's command, without the assent of the house. R. 16 Car. 3 Rush. 1137.

[39 G. 3. st. 2. c. 14. respecting the power of the king to summon parliament after an adjournment.]

## (O) Prorogation.

## (O 1.) Of what effect it shall be.

None can prorogue the parliament but the king. Co. L. 110, a.

The prorogation makes a session of parliament. 4 Inst. 27.

And all bills which had not the royal assent begin *de novo* at the next meeting of parliament. 4 Inst. 27. H. Parl. 38.

So, all orders, and every thing before them, determine, except a *scire facias*, and a writ of error. Per Cur. 17 Car. 2. 1 Lev. 165.

So, a writ of error shall be discontinued by a prorogation. 1 Vent. 31. 1 Sid. 413. Vide post, (P 2.)

And, if a new writ of error was taken teste'd the last day of the parliament, returnable at the day to which it was prorogued, it was doubted, whether it was not discontinued by the prorogation. 1 Vent. 31.

But afterwards the law was declared, and is now so taken, that a writ of error does not determine by a prorogation of parliament. R. by the lords in parliament. 2 Lev. 93.

[37 G. 3. c. 127. respecting the power of the king to summon parliament after prorogation.]

## (O 2.) How prorogued.

The king may prorogue the parliament.

And none but the king in person, or by commission.

The form of the commission. Vide D'Ew. 77. 94.

But,

But, though it be by proclamation prorogued to a certain day, it may afterwards by proclamation be assembled in the mean time. As the parliament 19 Jac. was adjourned to 8 Feb. and afterwards assembled 20 Nov. Rush. 39.

The parliament 19 Car. 2. was prorogued to 10 Oct. 1667, and afterwards summoned by proclamation for the 25 July preceding, upon account of a war with Holland: and because peace was concluded, it was again put off to the 10 Oct. 1 Sid. 338.

## (P) *Dissolution.*

The parliament shall not be dissolved but by the king. Co. L. 110. a. Hut. 62.

The king shall be present at the dissolution, in person, or by representation. 4 Inst. 28.

As if he dissolves it by commission: as, 2 Car. Rush. 399.

The form of the commission, Vide D'Ew. 275. 330. 390.

But, without the command of the king in person, signified by the chancellor, &c. or by the king's commission or letters patent, the parliament cannot be dissolved. D'Ew. 547.

By the st. 8 H. 5. 1. the parliament was not dissolved by the king's return into the kingdom, where it was summoned and held by the guardian of the kingdom. 4 Inst. 7.

Nor, by the st. 4 Ann. 8. s. 22.

A parliament called by the lords justices, by arrival of the king or queen into the realm.

Nor, by the st. 2 W. & M. 6. by his majesty's voyage, or absence out of the realm.

Nor, by the st. 7 & 8 W. 3. 15., 4 Ann. 8., & 6 Ann. 7. s. 4. by the death or demise of the king, queen, or her successors; but shall continue to act (or, if prorogued, shall immediately convene and sit; or, if none in being, the last parliament shall convene and sit) six months, and no longer, unless sooner prorogued, or dissolved by such successor.

When the parliament is to be dissolved, the commons are summoned to the upper house, and then the chancellor, by command of the king, dissolves the parliament. 4 Inst. 28.

By the st. 16 Car. 1. 7. it was enacted, that the parliament should not be dissolved, or adjourned, but by act of parliament.

And that parliament was declared and enacted to be fully dissolved and determined. [By the st. 12 Car. 2. 1.]

So, by the st. 13 Car. 2. 1.

By st. 6 W. & M. 2. no parliament shall have continuance longer than three years, from the day on which, by the writ of summons, it is appointed to meet. Which by the st. 6 Ann. 7. s. 7. extends to the parliament of Great Britain.

[By the st. 1 G. 1. st. 2. 38. all parliaments may have continuance for seven years, and no longer, to be accounted from the day on which by the writ of summons such parliament shall be appointed to meet, unless such parliament shall be sooner dissolved by the king, his heirs, or successors.]

Every parliament determined by the death of the king.

Though there were a statute which said, that it should not be dissolved without the consent of both houses, without express words for the continuance after the death of the king. R. 14 Car. 2. Kelg. 14. [Vide the statutes quoted above which provide for this.]

[§7 G. 3. c. 127. provides for the case of the demise of the king subsequent to the dissolution or expiration of a parliament.]

### (P 2.) The effect of a dissolution.

When a parliament is dissolved, appeals, or writs of error, pending in parliament, do not abate by the dissolution; but the next parliament shall proceed upon them in the state which they were in at the dissolution, without beginning *de novo*. Ray. 383.

So, an impeachment by the commons, is not altered by a dissolution. Ray. 383.

For the proceeding against the party impeached may be in the next, or a subsequent parliament. Carth. 132.

And therefore, the party impeached shall not be bailed in B. R. after the dissolution. Cont. in Ld. Danby's case, (Vide Skin. 56. 162.) Acc. Carth. 132.

Yet, by a dissolution, a writ of error is suspended: and therefore, a defendant in execution shall not be bailed upon the recognizance given upon the writ of error in parliament: for, if there should be a dissolution before judgment affirmed, the party would be at large. R. by all the judges. 1 H. 7. 20. a. Vide ante, (O 1.)

And the writ itself is determined: for there shall be another writ of error at the next parliament. R. 2 Cro. 342.

And execution shall be taken in B. R. upon the judgment. R. Ray. 5. R. Jon. 66.

### (Q) Session of parliament; what shall be.

If the parliament meets, and passes any statute, that makes a session. 4 Inst. 28.

So, if error be brought there, and judgment in it, though no statute passes, it is a session. As, 18 R. 2. 4 Inst. 28.

But if no judgment be given, nor act passed, it shall be called a convention, but not a session. 4 Inst. 28. R. Hut. 61. 2 Bul. 235. 237. 1 Vent. 22. H. Parl. 38.

Though orders are made, and bills agreed on. Hut. 61.

Though bills pass each house of parliament, if there be not the royal assent, or dissent. R. 1 Rol. 29.

If an act continues to the next parliament, and the parliament begins, but is dissolved before any session made, the act is not determined. Ibid.

If an act passes the royal assent, the session does not conclude till a prorogation. 4 Inst. 27. Ha. Parl. 37.

Or, a dissolution. Ha. Parl. 37.

And, for avoiding doubt in this point, by the st. 1 Car. 7. it was enacted and declared, that the assent of the king to that or other acts shall not determine the session.

And the same provision was by the st. 12 Car. 2. 3. s. 7. and by the st. 22 & 23 Car. 2. 1. s. 9.

And a parliament may have several sessions. Hut. 61.

Yet

Yet each session, for several purposes, shall be a several parliament in law. 4 Inst. 27.

## (R) Act of parliament.

### (R 1.) Relates to the beginning of the session.

Every act of parliament relates to the first day of the session, if it be not otherwise provided by the act itself. 4 Inst. 25. R. Pl. Com. 79.b. H. Parl. 35. [Ld. Raym. 119.]

And, therefore, if an act takes away the benefit of clergy for an offence, the felon shall not have his clergy for an offence committed after the first day of the session, though committed before the royal assent given. 1 And. 295.

[The relation of the act to the first day of the sessions, obtains even where the act is to take effect "from and after the passing of the act." 4 T. R. 660. 662. n.]

[By 33 G. 3. c. 13. the time of receiving the royal assent shall be indorsed on every act, and from such date only shall it be in force, unless otherwise declared.]

[When an act is passed to supply an omission in a previous act, it has relation to the time of the former, being of the same session. 2 Price, 381.]

### (R 2.) How long it shall have continuance.

If an act be to have continuance for three years, and from thence to the end of the next session of parliament, it shall continue to the end of a session which begins after the three years, though a session within three years continues several months or years after the three years. 1 Vent. 22.

### (R 3.) What shall be an act of parliament.

Every act of parliament ought to be enacted by the assent of the king, lords, and commons. 8 Co. 20.b. The Prince's Case. 4 Inst. 25. Pl. Com. 79. a. Ha. Parl. 31. Vide ante, (G 21.)

And therefore, if it appears to be passed without the assent of the commons, it shall be void. Mo. 824.

Or, without the assent of the lords, or of the king. Pl. Com. 79. a. Ha. Parl. 32. Vide ante, (G 10.)

So, if it be by the assent of the king, the lords spiritual only, and the commons, it is but an ordinance, and no act of parliament. 4 Inst. 25.

Or, by the king, the lords temporal, and commons. Ibid.

But it is not necessary that any of the lords spiritual assent, if there be a majority of the lords assembled in parliament. Seld. 3 vol. 2 P. 1528.

So, if all the spiritual lords assent conditionally, for the condition is void. 4 Inst. 35.

Or, if the spiritual lords are absent. 3 Rush. 1344.

So, it is not material that the assent of the king, lords, and commons be particularly expressed: for *per assensum parliamenti*, comprehends the assent of all. Jon. 104.

So, if by the roll it appears that the bill was sent to the lords by the commons,

commons, with a proviso annexed, and no proviso is extant upon the record, yet it shall be a good statute. Hob. 110.

And if the journal of parliament be variant from the record, it does not prejudice, for that is no record. Hob. 110, 111.

So, it is not material in what form it is expressed: for it may be in the form of a charter. Co. L. 98. 8 Co. 18, 19. The Prince's Case.

Or, by way of a grant by the king in parliament. Co. L. 98.

And therefore, if the king grants *per consilium fidelium subditorum*, and it has always had the reputation of an act of parliament, it is sufficient. 8 Co. 20. a. The Prince's Case. Jon. 103.

So, if the act be penned, *de concilio prælatorum, comitum, baronum et aliorum de regno nostro statuimus, &c.* Vide 8 Co. 20. a. The Prince's Case.)

So, if it be certified as an act of parliament by the chancellor when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify, though the royal assent be not expressed. 3 Keb. 587.

General acts are always inrolled by the clerk of the parliament, and delivered to the chancery, which inrolment in chancery makes the original record. R. Hob. 109. Vide ante, (G 22.)

But private acts are not inrolled without special suit; but the original bill, with the assent of the lords and commons, and royal assent indorsed, and filed and labelled with the other bills to which the great seal is annexed, which remain with the clerk of parliament, is the original record. Hob. 109.

#### (R 4.) What not.

But acts which passed in parliament before time of memory (which by the st. W. 1. 38. is limited to the coronation of R. 1. who began his reign 6 July, and was crowned 3 Sept. 1189,) are not pleadable as statutes or acts of parliament. Hist. C. L. 3, 4, &c.

And therefore, all statutes before the conquest, or in the times of W. 1. W. 2. H. 1. Steph. H. 2. are incorporated and part of the common law; but if they should be found in records or histories they ought not to be reputed as acts of parliament. Hist. C. L. 3.

So, acts which upon the roll or record appear to be passed without the assent of the lords or of the commons, are not statutes. Hob. 111.

#### (R 5.) How it shall be determined whether it be a statute or not.

The judges ought to take notice of a general law, and therefore ought to determine whether it be a statute or not. Co. L. 98. b. Hist. C. L. 16. 1 Lev. 296. Dy. 93.

And therefore a man cannot plead to it *nul tiel record*. 8 Co. 28. a. The Prince's Case.

So, it shall not be proved by a journal. Hob. 110.

Or, alleged that the assent of the commons was conditional. Mo. 824.

And, therefore, if no journal or record of it be now extant, the judges, by antient pleas, common allowance, &c. may determine whether it be a statute or not. Hist. C. L. 16. 20.

To a private act, if it be not produced in an exemplification under seal,  
the

the party may plead *nil tiel record*. Hist. C. L. 16. 8 Co. 28. b. The Prince's Case.

Vide ante, (G 32. — R 3.)

(R 6.) What shall be a general act.

All acts which concern the king, who is the head of the commonwealth, are general laws of which the judges will take notice without pleading. R. 8 Co. 28. a. The Prince's Case. R. 4 Co. 13. 77. a.

So, if they concern the queen, for she is the king's wife. 8 Co. 28. b. The Prince's Case.

Or, the prince, for he is the eldest son of the king, and the heir apparent to the crown. R. 8 Co. 28. b. The Prince's Case.

And therefore the st. 2 R. 2. 5. *de scandalis magnatum*, is a general law, for it touches the prelates, nobles, and great officers who are of the king's council. R. 4 Co. 13.

So, the st. 35 H. 8. which concerns the capacity of the queen. 8 Co. 28. b. The Prince's Case. R. Pl. Com. 231. a.

So, the st. 11 Ed. 3. which makes the prince duke of Cornwall. 8 Co. 28. b. The Prince's Case.

So, a statute which concerns the whole spirituality, will be a general law: as, the st. 21 H. 8. 13. R. 4 Co. 76. a. 1 Brownl. 208.

So, the st. 13 El. 10. and 18 El. 11. 4 Co. 76. a. 120. b. 1 Brownl. 208.

So, a statute which concerns all officers in general: as, the st. W. 1. 26. that no sheriff or other minister, take reward, &c. 4 Co. 76. a.

So, a statute, which concerns trade in general. 4 Co. 76. b.

So, the st. 1 Jac. 22. which relates to shoemakers, &c. is a general law. R. Lut. 1410.

So, the st. 2 Ph. & M. 11. which relates to woollen weavers, &c., for the penalties are given to the king. Skin. 429.

So, a statute which concerns all the lords generally; as, the st. Marl. 3. 4 Co. 76. b.

So, if it concerns all persons generally, though it be but a special or particular thing; as, a statute which concerns appeals or assises, or other particular action. Ibid.

*Elegit*, attain, &c. Ibid.

The st. Mert. 6. and 4 H. 7. 17. concerning wards. Ibid.

The st. W. 2. [vide W. 1. c. 20.] *de malefactoribus in parvis*, and *charta de foresta*. 8 Co. 138. b.

The st. 22 Ed. 4. 7. and 35 H. 8. 17. of woods in forests, chases, &c. R. 8 Co. 138. b.

[Statutes relating to trade in general are considered public. *Secus*, if to a particular trade. 1 T. R. 118.]

(R 7.) What shall be a private act.

But a statute which concerns only a particular species or thing, or person, will be a private act, of which the judges will not take notice, without pleading it; as, the st. 18 El. 6. touching the colleges only in the universities. Eton and Winchester, 4 Co. 76. a.

[In a private act of parliament the legislature only lends its aid to the agreement

agreement of the parties in order to render it effectual, when any public reason stands in the way. By *Ld. Mansfield, Ch. J. Dougl. 406.*]

[It is a rule that private acts of parliament introduced only for the settlement of particular estates ought to be considered only as common conveyances, and directed by the same rules of law. By *Ld. Hardwicke, Ch. J. 1 T. R. 93. n. a. 1 Vent. 176.*]

[Private acts of parliament are to be construed according to the intention of the parties, and such intention must be collected from the words used by the legislature, without doing violence to their natural meaning. By *Lord Kenyon, Ch. J. 2 T. R. 705.*]

So, the st. 1 El. 19. which relates to bishops only. 4 Co. 76. a. R. 5 Co. 2. a. 13 Ed. 4. 8. b.

So, the st. 23 H. 6. 10. which relates to sheriffs only. 4 Co. 76. b. Cont. per two Ch. J. 1 Lev. 86. Semb. cont. per Hale, 2 Lev. 103. Acc. per Mont. Pl. Com. 65. Dy. 119.

[It is now decided that this statute is a public act, and therefore the court will take notice of it, though it be not pleaded. And if it appear in a declaration, by the assignee of the sheriff, on such bond, that the bond is void by the provisions of the statute, the court, on motion, will arrest the judgment after verdict against the defendant, on a plea of *non est factum*. 2 T. R. 569.]

So, a statute which relates to licences by king H. 6. to corporations. R. 13 Ed. 4. 8. b.

So, the st. 1 W. & M. 18. for toleration of dissenters. R. 1 Sal. 168. a.

So, a statute which relates to a particular place or town, will be a private law, though it concerns all persons; as, if it relates to such a manor, town, &c. 4 Co. 76. b. Skin. 350.

[So, if it relates to a particular trade. 4 Co. 76. 1 T. R. 125.]

Or, to divers particular towns. 4 Co. 76. b.

Or, to one, or divers particular counties. Ibid.

So, in a general act there may be a private clause; as, in the st. 3 Jac. 5. the clause which gives the benefices of recusants in such particular counties to the university, is a private law. R. 10 Co. 57. b.

The judges will not take notice of a private act, unless it be pleaded.

Though it makes void all proceedings to the contrary in such a place. R. Skin. 350. 407.

[An act private in its nature, but declared public by a special proviso, reciting that A. is proprietor of such a property, does not invest him with a better title than he had before. 3 B. & P. 565.]

[Statutes passed on the petition of individuals, are considered private, in point of construction. 8 T. R. 468.]

[Private statutes must be construed with reference to the intention of the parties concerned, as collected from the words used. 2 T. R. 705. And, if for settling estates, they must be construed as common conveyances are. 1 T. R. 93. Lofft. 416.]

[Notice will be taken only of that part of a private act which is pleaded. 1 T. R. 118.]

(R 8.) When the king shall be bound by an act of parliament.

[Generally speaking, the king is not, in his royal character, bound by any

any statute, in which there are not express words for binding him. 3 T. R. 521.]

[The king is, in respect of his prerogative, virtually exempted from every act imposing a duty or tax upon the subjects. D. 3 T. R. 522.]

[The king is never comprehended in a statute under the word "party." Ld. R. 1066.]

If an act speaks of the king indefinite, being named in his politic capacity, it extends to all his successors. R. 12 Co. 110. R. 6 Co. 27. a.

So, to a queen, if the crown descends to a female. 12 Co. 110.

But, generally, the king shall not be restrained of a liberty or a right which he had before, by the general words of an act of parliament, if the king be not named in the act. Pl. Com. 240. 3 T. R. 521. Parker, 3.

Yet, if a statute be intended to give a remedy against a wrong, the king, though not named, shall be bound by it: as, by the st. 32 H. 8. 28. to prevent a discontinuance by the husband of the lands of his wife during coverture. R. 2 Inst. 681. D. Parker, 5.

So, in all statutes made against wrong to prevent fraud, or the decay of religion, the king is bound. R. 5. Co. 14. b. D. 3. F. 185. in socio. Parker, 4.]

And therefore, the king shall be bound by the st. W. 2. 1 *de donis*. 5 Co. 14 b. Parker, 5.

So, by the st. W. 2. 5. against tortious usurpations. Ibid.

[By the restraining acts of 1 Eliz. c. 19. and 13 Eliz. c. 10. D. 3 F. 185. Parker, 6.]

[By the statute of Marlebridge, of distresses. Parker, 5.]

[So, the king, though not named, is bound by acts for the advancement of religion, or of learning, or providing for the poor; as, the act 10 Car. for uniting livings in Ireland. Str. 516.]

(R. 9. a.) Repeal of a statute; what shall be.

An act of parliament may be repealed by the express words of a subsequent statute, or by implication.

So, if a subsequent statute contrary to a former, has negative words, it shall be a repeal of the former.

So, if a subsequent statute enacts a thing inconsistent with a former: as, the st. 1 & 2 Ph. & M. st. 2. 2. which says, all ecclesiastical jurisdiction of bishops, &c. shall be in the same estate as to process, &c. as it was *temp*. H. 8. repeals the st. 1 Ed. 6. 2. which says process shall be in the king's name, &c. R. 12 Co. 8.

So, if the st. 1 Ed. 6. 2. be repealed by the st. 1 & 2 Ph. & M. st. 2. 2. and this is repealed by the st. 1 El. 1. as to all particulars not expressed afterwards, and the st. 1 El. revives expressly the st. 25 H. 8. 20. which is contrary to the st. 1 Ed. 6. 2. the st. 1 Ed. 6. 2. continues repealed. R. 12 Co. 8.

So, if a subsequent act be contrary to a former in matter, it shall be a repeal of the former, though the words are affirmative: as, the st. 1 & 2 Ph. & M. 10. that all trials for treason, &c. shall be according to the common law, is a repeal of the st. 33 H. 8. 23. that any examined before the king's counsel, who confesses treason, &c. shall be tried in the county where the king pleases. R. 11 Co. 63. a.

The



The st. 1 Ed. 6. 14. which takes away chantries, is a repeal of the st. W. 2. 41. which gives a *cessavit de cantar*. 11 Co. 63. a.

But a later statute, general and affirmative, does not abrogate a former which is particular: as, the st. 5 El. 4. that none use a trade without being apprentice, does not take away 4 & 5 Ph. & M. 5. that no weaver use, &c. R. 6 Co. 19. b.

So, a subsequent act, which may be reconciled with a former, shall not be a repeal of it. R. 11 Co. 63, 64.

As, the st. 16 R. 2. 5. that a person attainted in *premunire* shall forfeit all lands, does not repeal the st. *de donis*, as to lands in tail against the issue in tail. 11 Co. 63. b.

[It is a general rule that subsequent statutes, which add accumulative penalties, do not repeal former statutes. Cowp. 297. 6 Mod. 140.]

Though there are negative words; as, the st. 1 & 2 Ph. & M. 10. that all trials shall be according to the course of the common law, and not otherwise, does not take away 35 H. 8. 2. for trial of treason beyond sea. R. 11 Co. 63. a.

[So, the bare recital in stat. 3 Jac. 1. c. 14. is not sufficient to repeal the positive provisions of the stat. 23 H. 8. c. 5. without a clause of repeal. By Ashurst J. 2 T. R. 365.]

So, an act, which repeals a statute by which another was repealed, will be a revivor of the statute which was repealed. R. 12 Co. 7.

So, though the words are, that no statute not expressly mentioned shall be revived, if thereby another statute is revived which mentions it to be in force: as, the st. 21 H. 8. 13. of pluralities, being mentioned to be in force by the st. 25 H. 8. 21. which was revived by the st. 1 El. 1.; though it says, that no statute repealed by the 1 & 2 Ph. & M. st. 2. 2. shall be in force, if it be not specially revived.

Yet if a statute be repealed by several acts, a repeal of one act and not of all, does not revive the first statute. R. 12 Co. 8.

[Subsequent statutes, which only add accumulative penalties, do not repeal former statutes. Cowp. 297.]

[Statutes cannot be repealed by non-user; though where the act is ambiguous user and non-user may go far to explain it. 2 T. R. 274. 3 T. R. 364. 2 T. R. 358.]

[A statute cannot be repealed by a recital in another statute. 2 T. R. 358.]

[Where a statute superadds penalties to a common law offence, it does not repeal the common law offence and punishment. 1 East, 143.]

### [ (R 9. b.) Other matters.]

[A statute is not revived by the expiration of a temporary repealing statute. 3 East, 205.]

[A statute reviving a temporary act, then expired, has a retrospective influence. 4 T. R. 109.]

[Registration of a statute, in a particular county, is an immaterial circumstance to the statutes obligatory force. 2 T. R. 201.]

[Clauses limiting the rights of the crown, are repealed by subsequent statutes unless expressly re-enacted. 1 Price, 438.]

[The crown cannot controul a statute: thus, not by its licence. 1 Taunt. 227.]

[Where

[Where a transaction is made void by statute, to protect one man from the designs of another, it is utterly void. But voidable only, where made to protect the rights of third persons. 2 T. R. 603.]

[A transaction contrary to a penal statute, is void. 1 Taunt. 131.]

### (R 10. a.) How a statute shall be expounded.

[Where the words of a statute are doubtful, general usage may be called in to explain them; but where they are clear, the usage of a particular place cannot controul them. 1 T. R. 728.]

### (R 10. b.) According to the intent.

Every statute ought to be construed according to the intent of the parliament: and therefore, if a corporation be misnamed, if it appears that it was intended, it is sufficient. R. 10 Co. 57. b. Vide Parols, (A 18.)

Where the st. 18 Ed. 1. 1. *quia emptores terrarum*, says, every one shall hold of the lord paramount *secundum quantitatem terræ*; this shall be construed according to the value: for so was the intent. Pl. Com. 10. 57. b.

Though it be a penal statute. Pl. Com. 10. Hard. 208.

For every statute ought to be expounded, not according to the letter, but according to the intent. 2 Rol. 318. Pl. Com. 353. 363.

[In the construction of statutes, the ends contemplated are to be considered. 3 M. & S. 510. 2 T. R. 161.]

[If the enacting words can take in the mischief, they shall be extended for that purpose, though the preamble does not warrant it. 3 Atk. 203.]

[In an inclosing act, if the lands to be inclosed are to be subject to the same charges and incumbrances as the owner's former lands were, it means incumbrances on the estate, (as dower, &c.) and not the being subject to the repair of a church. 3 B. M. 1375.]

[The st. 22 C. 2. c. 11. which enacts that a certain toll shall be paid for wharfrage and cranage of goods brought unto, shipped off, loaden or unloaden at Brook's wharf, does not extend to such goods as are not landed there, but put on board lighters, while the vessel is moored and fastened to the wharf. 3 B. M. 1408. 1 Bl. 413. 423.]

### (R 11.) Expounded by the preamble.

The preamble is a good means for collecting the intent.

So, the ground and cause of the making of a statute explains the intent. Pl. Com. 173. 204.

[But in a variety of cases it has been determined that strong words in the enacting part of a statute may extend it beyond the preamble. By Ld. Mansfield, C. J. Cowp. 543.]

[But the preamble of a statute cannot restrain the enacting part of it, where the enacting part is clearly larger than the preamble. By Ld. Mansfield, C. J. 1 Bl. 659.]

[Positive enactments are not restrained by the preamble. 1 T. R. 44. 4 T. R. 790. 3 M. & S. 62. Lofft. 783.]

[If in the same act of parliament there be one clause which applies to a particular case, and another which is conceived in general terms, the

the former shall not restrain the signification of the latter. By Buller, J. 2 T. R. 164.]

(R 12.) By the rules of the common law.

So, a statute ought to be construed according to the reason and rule of the common law. Pl. Com. 10. b.

[Though it be a private act. 3 Wils. 496.]

The st. Marl. 25. provides, that the vill be not amerced by the justices in eyre, if a sufficient jury appears; which was conformable to the common law, by which jurors who make default, though twenty-four are summoned, should not be amerced if twelve appear. 2 Inst. 148.

After the st. of West. Gloc. 5. which gives wast against tenant by curtesy or dower, against whom it lay by the common law, it shall not be brought against their assignee, though he be within the words of the statute; because it does not lie against their assignee by the common law. 2 Inst. 301.

[If expressions have acquired a definite meaning in law, they must be expounded. 2 M. & S. 230.]

(R 13.) When expounded by equity : — A remedial statute :  
— To another conveyance.

So, the judges expound a case within the mischief and cause of an act, to be within the statute by equity, though it be not within the words. Co. L. 24. b. Hard. 208. Vide post, (R 15.)

As, if a statute be remedial, it shall be extended by equity to other cases within the same mischief.

And, therefore, where the st. Marl. 6. provides, that a feoffment to the heir, to defraud the lord of ward, &c. be void, it extends to a grant, fine, recovery, lease and release, confirmation, or other conveyance. 2 Inst. 110.

Where the st. W. 2. 1. prohibits *quod illi quibus tenementum fuit datum non habeant potestatem alienandi* the heirs of the donees by equity, are under the same prohibition. Pl. Com. 13. b.

[So, the st. 3 & 4 Ann. c. 9. relative to promissory notes, must have a liberal construction, it being made for the benefit of trade and commerce. 3 Wils. 3.]

[On the expiration of several insolvent debtors' acts, and the revival of them, the court held equitably, "that the prisoners should have another term after the then first term allowed them to lodge their petitions." 2 B. M. 747.]

[Stat. 2 G. 2. c. 22. continued by 29 G. 2. c. 28. expired 1st June 1759. Stat. 32 G. 2. c. 28. commenced 15th June 1759; so there was a chasm of fourteen days. The court declared, they would construe equitably, and that Trinity term 1759, ought to be considered as the term in which such prisoners (as had been precluded by the expiration of the former act from completing their discharge under it) were charged in execution, and therefore they had Michaelmas term for the first term next after their being charged in execution. 2 B. M. 901.]

But a prohibition by an inferior conveyance, does not extend to a superior way; as, the st. 31 H. 8. 13. which exempts from tithes, lands,

lands, &c. which by surrender, dissolution, forfeiture, &c. or other means, come to the king, does not extend to lands, &c. which come to the king by a subsequent act of parliament. 2 Co. 46. b.

[A *cosus omissus* can in no case be supplied by a court of law; for that would be to make laws. 1 T. R. 52.]

(R 14.) To other persons.

So, if a statute makes the securities given by the sureties of the farmers of the excise, to be exempted out of the act of oblivion, *a fortiori* the securities of the farmers themselves shall be exempted. R. Hard. 424.

The st. Marl. 6. which gives remedy to the lord for his ward against a feoffee by collusion, extends to the heir, or feoffee of the feoffee, and all those who have a conveyance from the lord by fine or otherwise, by collusion. 2 Inst. 112.

But if a statute begins with inferior persons, the general words do not extend to superior persons: as, the st. W. 2. 41. *si abbates, priores, custodes hospitalium, et aliarum domorum religiosarum*, does not extend to a bishop. Dy. 109. b. (Vide 2 Inst. 457.) Vide post, (R. 26.)

So, the st. 13 El. 10. which restrains leases by colleges, deans and chapters, parsons, vicars, and others having spiritual promotions, does not include bishops. 2 Co. 46. b.

(R 15.) To all cases within the same mischief.

So, in all cases within the same mischief, the case shall be construed within the intent, though it be not within the letter of the statute. Vide ante, (R 13.)

As, the st. Marl. 29. which gives remedy to the successor *ad bona ecclesiæ repetenda*, extends to trespass for cutting down trees. 2 Inst. 152.

[Statutes *in pari materiâ* are to be considered as one law, and construed together. 2 T. R. 387. Id. 586. Lofft. 371. Dougl. 30. 4 M. & S. 210.]

[Statutes relating to the some class of persons, are not, unless *in pari materiâ*, to be incorporated together. Hence, the venue in actions against toll-gate-keepers acting *quasi* under st. 25 G. 3. c. 51., is transitory. 5 T. R. 16.

(R 16.) But a thing out of the mischief, shall be out of the purview, though within the letter of the statute.

So, a case out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, though it be within the words of the statute. 2 Inst. 386.

[All statutes *in pari materiâ*, are to be construed as one law. Dougl. 30. 1 T. R. 53. 3 T. R. 135.]

R 17.) So, a statute extends to a provision made by a subsequent statute.

Therefore a statute shall be extended to cases provided by a subsequent statute; as, if extensors value goods too high upon the st. Acton Burnel, 13 Ed. 1. they shall take them at the same price, as was provided by the st. de Merc. 11 Ed. 1. Hard. 211.

The st. M. Ch. 9 H. 3. 9. which says *omnes barones de quinque portibus habeant omnes libertat. et consuetudines suas*, shall be restrained to such liberties as are not taken away by another branch of the same statute; and therefore they shall not hold *placita coronæ*. 2 Inst. 31.

A statute made in affirmance of the common law, extends to all future times. 2 Inst. 236.

(R 18.) And for necessity, shall be expounded contrary to the letter.

So, for necessity, that there be not a failure of justice, a statute shall be expounded contrary to the words: as, the st. M. Ch. 9 H. 3. 12. which says, *quod assise non capiant, nisi in suis comitatibus*; but an assise of a commote in the marches of Wales shall be taken in the county of Gloucester, though it lies out of the county: for the lord of the marches shall not be a judge in his own case. 2 Inst. 25.

So, the st. of Mert. 3. which gives a *redisseisin*, to be tried by the first jurors; it shall be tried by others, where there was no first jury. 2 Inst. 84.

The st. of Marl. 4. which says, *nullus ducet district. extra com.*, does not extend to a case where the manor is in another county. 2 Inst. 106.

The st. of Marl. 22. says, *nullus jurare faciat tenentes suos contra voluntates*, but they may be sworn to present articles of a court-baron. 2 Inst. 142.

(R 19.) Though the statute be penal in some respect.

So, a statute for suppression of wrong, or for public good, shall be taken by equity, though it be penal against the offenders. Pl. Com. 82. a. 17. b.

[Where an offence created, or made penal by statute, is in its nature single, one single penalty only can be recovered, though several join in committing it; but if the offence is in its nature several, each offender is separately liable to the penalty. Cowp. 610.]

As, the st. of Gloc. 5. which gives treble damages, &c. in waste against tenant for years, extends by equity to a tenant for half an year. Pl. Com. 178.

The st. W. 2. 11. which gives debt against a gaoler for an escape of one committed for arrearages of an account, extends to an escape of any committed in execution for debt. Pl. Com. 178. a. 35. b.

So, the st. Gloc. 5. which gives remedy for waste against a lessee, extends to a devisee for life, or years. Pl. Com. 10. a.

The st. 1 Ed. 2. *de frangentibus prisonam*, says, that a felon who breaks prison shall be guilty of felony: but it shall not be so, if the prison was on fire. Pl. Com. 13. b.

[A penal statute cannot be extended to other cases than those intended by the legislature, even though within the mischief aimed at. 4 T. R. 665.]

(R 20.) But, generally, a penal statute shall not be taken by equity.

But a penal statute, generally, shall not be taken by equity: and therefore, the statute against maintenance shall not be construed by equity. R. Pl. Com. 86. b.

Nor,

Nor, a statute which gives a penalty in an attaint. Pl. Com. 86. b.

[It is not a rule, that courts, in the exposition of penal statutes, are to narrow the construction. Where the sense is doubtful, they are to be construed in favour of the supposed offender; but where it is plain, they must be literally followed. 1 T. R. 101.]

The st. *de malefactoribus in parcis* does not extend to those in forests. Pl. Com. 124. a.

So, the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

As, the st. W. 2. 11. that the body of an accountant shall be committed by the auditors to gaol, without saying at what time; but he cannot be committed by them, if it be not immediately upon the account. Pl. Com. 17. b.

[So, where the st. 19 G. 2. c. 34. s. 2. directs that the sheriff should proclaim the order in council against offenders under that act, in two market towns near the place where such offence was committed; the word near shall be taken to mean a reasonable vicinity, though not equivalent to next. 1 Wils. 164. 1. Bl. 20.]

If a statute for any offence gives a forfeiture of body and goods, it shall be restrained to the liberty of his body, and is not taken to be capital. R. Hob. 270.

The st. of Gloc. 1. says, damages shall be recovered in *mort d'ancestor* as in assise; but they shall not be recovered against an occupier who is not tenant to the writ, though they shall be recovered against him in an assise, when the disseisor is insufficient. 2 Inst. 287.

[The st. 7. G. st. 2. ss. 8. enacts, that all contracts for South-Sea stock, or an abstract signed by the party, shall be registered, or in default, to be void; and all such entries shall express the name of the person for whose use such contract was made. Plaintiff and defendant made a contract, and plaintiff registered the contract *verbatim*, and under it, this is for my proper use and benefit, and signed it with his own name; it was resolved to be well. 2 Ld. Raym. 1350. Str. 585.]

[A penal statute may also be a remedial law. 1 Wils. 126.]

[And a statute may be penal in one part, and remedial in another part. Dougl. 702.]

(R 21.) The words shall be taken beneficially for the king.

So, a statute made for the benefit of the king shall be construed most beneficially for him: as, the st. 17 Ed. 2. *de Præer. Regis*, which says, that the king shall have the ward of his tenant seised in fee, extends to his tenant seised in tail. Pl. Com. 11. a.

(R 22.) Words of permission shall be obligatory.

If a statute says, that a thing for the public benefit may be done, it shall be construed that it must be done: as, the st. 23 H. 6. 10. says, the sheriff, &c. may bail, he shall be bound to bail. (Vide Sal. 609.) Vide Bail, (F. 10.)

So, where the st. 14 Car. 2. 12. says, churchwardens and overseers, &c. may make rates to reimburse the constable: an indictment lies against them if they refuse it. R. Sal. 609.

(R 23.) Affirmative words when they do not take away the common law.

So, affirmative words in an act of parliament do not take away the common law. Pl. Com. 112. b.

And therefore, where by the st. 1 El. 2. a minister, who does not read the common prayer, shall lose the profits of his benefice for the first offence, and being convicted, &c. for a second offence, shall be deprived; yet he might be deprived by the high commission erected by the power of the common law for the first offence, without a conviction, &c. or the methods directed by the statute. R. 5 Co. 5. b. De Jur. Eccl.

So, general words do not take away a particular privilege or benefit: as the st. W. 2. 18. which gives an *elegit*, does not take away the privilege an infant has, that he shall not be sued during his nonage, if an *elegit* be against the heir of a consor, being an infant. 2 Inst. 395.

[Remedies given by statute, are cumulative to those at common law, though of a different nature. 1 T. R. 103. 7 T. R. 620.]

(R 24.) Nor a former custom.

So, where Southwark chose scavengers by custom, the st. 14 Car. 2. 2. which says, constable and churchwardens, &c. shall meet in Easter-week, and choose, does not take away a custom to choose at the leet. Dub. 2. Mod. 41.

[So, affirmative statutes do not take away a prior exemption. Dougl. 188.]

(R 25.) Nor a former statute.

So, the st. 23 El. 1. which gives 20*l.* per month against a recusant, does not take away the penalty of 12*d.* for every Sunday, given by st. 1 El. 2. 11 Co. 63. b.

But where affirmative words in sense contain a negative; as, where a new ordinance is made, which directs the form or order of the proceeding, it shall be otherwise. Pl. Com. 113.

(R 26.) Words which begin with inferior persons, do not include superior.

A statute, which begins with a prohibition to inferior persons, does not extend to persons of a superior degree; as, where by the st. W. 1. 3. fines or amerciaments shall not be levied for escapes by sheriffs or others, it does not extend to B. R. 2 Inst. 165, 166. Vide ante, (R 14.)

So, where an act of oblivion excepts accounts by sheriffs, bailiffs, or other officers; accounts by superior officers, as cofferer, &c. are not excepted. R. Hard. 442.

So, the st. Marl. 29. which gives trespass to the successor of an abbot, prior, or other prelate of the church, does not extend to a bishop. 2 Inst. 151.

But where a statute begins with inferior courts, and concludes *vel in aliis curiis*, this extends to superior courts; otherwise the words *vel in aliis curiis*, are void. 2 Inst. 137.

As,

As, the st. Marl. 19. *quod in comitatu, hundredo, curia baron., vel aliis curiis*, the tenant shall not be sworn to his essoign, extends to the courts of Westminster. Ibid.

(R 27.) Repugnant words controlled by the common law.

So, where the words of an act of parliament are against common right and reason, repugnant, or impossible to be performed, they shall be controlled by the common law. 8 Co. 118. a. Bonham.

And therefore, where by the st. W. 2. 21. a writ of *cessavit* is given *hæredi, petenti super hæred' petent'*, &c. the heir shall not have a *cessavit* for a *cesser* in the time of his ancestor, and the rent does not belong to him, and it would be against right and reason that he shall have an action in such case. 8 Co. 118. a. 2 Inst. 402.

So, the st. of Carlisle, 35 Ed. 1. that in the orders of the Cistercians and Augustines, the common seal shall be in the custody of the prior and four of the most discreet of the house, and that a deed sealed when the seal is not in such custody, shall be void, is impossible and impertinent, and therefore it shall be void; for when the abbot uses the seal for sealing a deed, it cannot be in their custody, and it would be unreasonable that a deed should be avoided by a bare surmise. 8 Co. 118. a.

So, a saving in the st. 1 Ed. 6. of chantries, &c. given to the king, to the donor, of all services, is void; for, by law, the king cannot hold of any. 8 Co. 118. b.

If an act of parliament gives to the lord of a manor the conusance of all pleas within his manor, he shall not have conusance where he himself is party. Ibid.

[Where a special authority is delegated by act of parliament to particular persons to take away a man's property and estate against his will; there it must be strictly pursued, and must appear to be so upon the face of the proceedings. Cowp. 26.]

[Usages that can vary the construction of an act of parliament must be universal, and not the usage of any particular parish alone. 1 T. R. 721.]

(R 28.) The exposition shall be such that the statute be not eluded.

But such exposition of a statute ought to be favoured, as hinders the statute from being eluded. 2 Rol. 127.

[(R 29. a.) Admissibility of usage to explain; and other matters.]

[When acts are ambiguous, usage may explain; *secus*, where not ambiguous. 1 T. R. 728. 3 T. R. 602. 2 T. R. 660. 6 T. R. 268.]

[Evidence to explain the meaning of technical words, is inadmissible. 1 Anst. 39.]

[Statutes are conclusive of facts recited therein as existing; and the courts must notice their existence *ex officio*. 3 M. & S. 67. 4 M. & S. 532.]

[Excepting that by mistating that a situation of things exists under a former statute, it does not create them. 4 Taunt. 831.]

[The expression, 'an act to be passed,' applies to an act passed in the same session, though prior in point of time. 14 East, 510.]



[Where a statute, declaring a particular act void, likewise makes it penal, it is utterly void. 4 Taunt. 876.]

[ (R. 29. b.) Construction of particular statutes.]

[One acting as an attorney, though he be not such, is liable to the penalty, under the certificate act, 25 G. 3. c. 80. (37 G. 3. c. 90.) Therefore, when sued for the penalty, it is sufficient to aver that he acted as an attorney. 6 T. R. 663.]

[The attorney's certificate-act, 25 G. 3. c. 80. (37 G. 3. c. 90.) does not extend to the county-court, though an attorney prosecute a suit therein for more than 40s. by virtue of a justice. 6 T. R. 663.]

[In the case of selling bread, &c. The offence is complete though the wholesale seller direct the purchaser not to re-sell until the expiration of the twenty-four hours. 3 T. R. 588.]

[A person who for brokerage and hire, negotiates and concludes bargains for stocks, is a broker in point of law. 4 Burr. 2103.]

[The st. 26 G. 3. c. 26. was not revived, from the time of its expiration, by st. 42 G. 3. c. 89., since the provisions in the latter statute, which may be supposed to have that effect, is only to indemnify those who have acted under the provisions of the former, supposing them still subsisting when they were not. 3 East, 205.]

[A vender of coals by the chaldron or lesser quantity, is liable to the penalty inflicted by st. 3. G. 2. c. 26. s. 13. for not meting the coals with the Queen Ann bushel, whether the sale is by pool or wharf measure. 3 East, 525.]

[Under stat. 3 G. 2. c. 26. s. 13. the offence of filling sacks with coals for sale, without having first duly measured them at the wharf or warehouse, is local, and the action, therefore, for the penalty, must be brought in the county where the wharf or warehouse lies. 4 East, 385.]

[*Seemle*, a coal-waggon is within the 19 G. 2. c. 35. s. 11. though the act contains only the words "cart or carts." 1 Smith, 417.]

[Where a penalty is given to the treasurer of a county, riding, or division, the word "division" must receive its legal and its popular sense, and therefore is inapplicable to parts of a county to which the magistrates, (acting under one general commission) for convenience, adjourn the quarter sessions, appointing a separate treasurer to each. 4 T. R. 224. 459.]

[Voting under a claim to vote as a freeman only, though without right, is not an offence within the Durham act, 3 G. 3. c. 15. where the party is entitled to vote in some other right; which last, therefore, must be negatived in an action on the statute. 1 Taunt. 128.]

[Breaking the moiles of glass bottles into the pot, is a putting in fresh materials within the 17 G. 3. c. 39. 1 Anst. 240. The 27 G. 3. c. 28. s. 15. by the word "square" means all rectangular figures. 1 Anst. 39.]

[A tanner selling hides by retail, is not within the penalties of 24 G. 3. c. 19. 1 Anst. 266.]

[The stat. 7 G. 2. c. 19. s. 2. makes it penal to mix with hops any drugs or ingredients, or other thing whatsoever, to alter the colour or scent thereof. This extends as well to ingredients that are beneficial as to those which deteriorate, therefore, to vapour of sulphur of brimstone. 6 T. R. 374.]

[Butter

[Butter exported from Ireland to Lisbon, and from Lisbon into this kingdom, was held not to be considered as included in the statutes which prohibited the importation of it from Ireland into this kingdom. 2 Burr. 1173.]

[The penalty inflicted by st. 31 G. 2. c. 32. s. 6. for selling plate without a licence, only attaches upon those who use the trade of vending plate. 4 East, 346.]

[A concealment of soap, in violation of the 1 G. 1. st. 2. c. 31. may be in an entered place, and by mixing with other soap, although done with the privity of the inferior attending officer. 2 Anst. 560.]

Vide more concerning Parliament, in Antient demesne, (F 2. — I — K). — Dignity, (C 5.) — Franchises, (F 3.) — Ireland, (C). — Pleader, (3 B 6.) — Scotland, (D 4.) — War, (B 6, 7.)

## PAROL.

### Parol agreement.

Vide CHANCERY, (2 C. 3.) — PARCENER, (C 5, 8.)

### Parol demurring.

Vide ENFANT, (D 1, 2.)

## PAROLS.

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### (A) How expounded.

#### (A 1.) Obsolete words.

Words in antient grants shall be expounded according to the usage and construction at the time of the grant.

As, by the word *sake*, the grantee may claim the suit of his tenants. Bro. Quo Warranto, 2. Kel. 145. a. 2 Rol. 245.

By the word *sake*, consanue of pleas of his tenants. Bro. Quo W. 2. Or, amerciaments of his tenants. Kel. 145.

By the word *murder*, amerciaments of murderers. Bro. Quo W. 2.

By the word *toll*, the tallage of his villeins. Bro. Quo W. 2. (Vide Kel. 145. a.)

By the word *them*, the issues of his villeins. Kel. 145. 2 Rol. 245. l. 51.

By a grant of *infangthief*, &c. the trial of felons taken within his precinct. (Vide Blo. Nom. in Verbo.)

A grant of *outfangthief* imports the trial of those of his fee taken for felony in another precinct. Ibid.

#### (A 2.) Terms of art.

So, words used as terms of arts ought to be observed. Vide Gar-ranty (A). — Indictment, (G 1, &c.)

(A 3.) Ambiguous words : — Ought to be taken as near as may be to the intent of the parties.

So, ambiguous words shall be expounded as near to the intent of the parties as may be: as, if an obligation be for payment of 100*l.* at the 10th Jan., on three months' warning; it shall be paid afterwards upon three months' notice, though it was not required at the 10th Jan. Semb. Ray. 61. Vide post, (A 18.)

[Where tenant for life, with a power to lease in possession and not in reversion, granted a lease to his only daughter, for 21 years "from the "day of the date," it was held that the parties understood, and used the word "from" in that sense which would make their deed effectual, and that therefore this was a lease in possession. Cowp. 717. 725.]

If a lease be to A. for life, rendering rent at Michaelmas, and after his death, to his executor till Michaelmas; the executor shall have it for the whole day of Michaelmas; otherwise, no rent would be due. Per Coke, 3 Leo. 211.

If a covenant be to make an assurance of divers lands, &c. it shall be construed of the whole, or of part, according to the intent. R. 1 And. 57.

If a term be devised to A., and if she dies before she accomplish her years of lawful age, to B.; if A. dies after 18, and before 21, B. shall have it: for, lawful age, shall be understood the age of 21 years, except where it is spoken of a ward in socage. R. 1 Ch. R. 99.

If an obligation be to pay at Lady-day, it shall be at the next which follows. R. 3 Leo. 7.

[If the mayor is to be sworn before the major part of the free burghesses, and it is found he was elected by the majority, and sworn *in presentia quamplurimorum liberum burgensium*, it is not good; for *quamplurimi* only signifies a good many. Str. 1097. Andr. 119. 241.

[If a man settles money (on failure of heirs-male of A.) to be equally divided between B., C., D., and E., or the respective issues of their bodies, in case they or any of them are dead at the failure of A.'s issue, share and share alike, viz. to each of them, or their respective children, one-fourth, provided if any are dead without issue at the failure of A.'s issue, then to be equally divided among the survivors of their respective children, in case any of them also shall be dead leaving issue of their bodies; the word children shall be extended to mean issue; and if B. dies without issue, and C. leaves children alive, D. children and great-grandchildren, and E. only grandchildren; the descendants of each shall have a third, which shall be divided among them *per capita*. 1 Ves. 196.]

[If A. demises to B. for ninety-nine years, if she so long live, and after her death, if she dies within the said term, or other determination of said term, the remainder thereof to her son C., for the residue of the said term, with penalty if B. or C. grind at another mill, heriot to be paid on the death of B. or C.; covenant that both shall repair, and A. covenants that both shall enjoy; the word term shall be understood to mean the time, (and so C. shall have it for the residue of the ninety-nine years,) and not the estate, whereby he would have nothing, as it would expire at B.'s death. 1 B. M. 282.]

[A turnpike act directs the road to and from the town of A. to be repaired, the same acts describes roads as from, to, and through other towns; the town of A. was paved lately before the act, and is kept in repair by the inhabitants; the act extends not to the town of A. 1 B. M. 376.]

[A devise to the prisoners in the Marshalsea prison in the borough of Southwark, means not the King Bench prison, but the prison of the Palace-court, which in common parlance is called the Marshalsea prison. 2 B. M. 1037.]

[The word "farm," in a will, is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass. 6 T. R. 345.]

(A 4.) Most strong against the grantor, and for the grantee.

So, ambiguous words shall be taken most strong against the grantor, and most beneficial for the grantee. Pl. Com. 10. b.

As, if a lease be by A. at will, rendering *6l. per annum*, and A. grants *eundem redditum* to B. for his life; B. shall have *6l. per annum* though the lease determines; for it shall be taken for such rent. R. Cro. El. 241.

(A 5.)

## (A 5.) Words abbreviated.

If words are written with an usual abbreviation, notice shall be taken of it; as, if a *venire facias* be awarded *de visu de B.* it shall be understood for *vicineto*, which is the usual abbreviation, though it be written without a dash. 2 Rol. 246. l. 15.

## (A 6.) Synonymous.

So, words of the same import may be used promiscuously: as, *quondam*, for *nuper*, and *vice versâ*. R. Pl. Com. 190. b.

[Indenture is always understood to be a deed. B. R. H. 342.]

[Friends is synonymous to relations. 2 Ves. 87.]

## (A 7.) Words, how explained.

The general words in the premises of a deed or grant, may be corrected, restrained and explained, by the *habendum*, or an exception. Hob. 169. De quo vide *Fait*, (E 5, &c. 9, 10.)

Or, by a condition annexed. Hob. 169. De quo vide *Condition*.

Or, by the context, or recital of the deed. Vide post, (A 18, 19.) — Covenant, (D 1.)

Or, by synonymous expressions, or clauses. Vide post, (A 16. 20.) — Covenant, (D 1.)

[Lands at C., in the tenure of A. B., devised by will, comprize woods and timber excepted in A. B.'s lease; "the tenure" are words of additional description. 1 Bl. Rep. 255.]

(A 8.) By a *viz.* or *scilicet*.

So, they may be explained by a *viz.* or *scilicet*, which is an ancillary clause, that expresses particularly what was general or doubtful. Hob. 172.

[So, words may be explained by putting stops, or using a parenthesis; and although stops are never inserted in acts of parliament or in deeds, yet the courts of law in construing them, must read them with such stops as will give effect to the whole. By Lord Kenyon C. J. 4 T. R. 65.]

As, if a man grant to A. and his heirs, *viz.* heirs of his body, it shall be an entail. Hob. 172.

But, if it be repugnant to the precedent words, it shall be void and rejected: as, if a man grant an entire rent out of B. and W., *viz.* so much out of B., and so much out of W., this does not make several rents. Ibid.

So, if A. covenant to pay 83*l.* quarterly, *viz.* 20*l.* at Michaelmas, 21*l.* at Christmas, 20*l.* at Lady-day, and 21*l.* at Midsummer, which do not amount to 83*l.* and if the *viz.* be rejected, the time of payment does not appear; for it shall be understood at the usual quarters by equal portions. R. 2 Lev. 99.

So, they cannot enlarge or diminish the precedent matter granted: as, if a man having three acres in D., grant all his land in D., *viz.* B. acre and W. acre, the third acre also passes. Hob. 172.

So, if he grant all his land in D. *viz.* B. and F., which lies out of D., that does not pass. Ibid.

If a man grant all the wood in his manor of D., viz. in B. wood, and C. wood, this does not restrain the grant in the residue of the manor. R. Hob. 170.

(A 9.) Collective.

So, *nomen collectivum* shall be extended to all persons comprised within the general name; as, if a man devise that his heir shall have his land as long as he pays such annual payments, and if his heir do not pay, that his executor shall have the land; this extends to all his heirs successively. R. 2 Rol. 253. l. 25. 35.

So, if a devise or limitation be to A. for life, and after his death to the heir of his body: though heir is a name of purchase, yet, being coupled with the words, of his body, it shall be taken as *nomen collectivum*, and make an estate-tail executed. R. 2 Rol. 253. l. 40. 50.

[So, if a man undertakes to pay a sum of money at a particular time, if any of the issue of the body of A., begotten by B., shall be then living, if any of the descendants of A. and B. be living at the time, though all their children be dead, the money must be paid. R. 2 T. R. 372.]

(A 10.) Exclusive.

So, a release of all demands, till such a day, viz. 24th April, excludes the 24th April, and an obligation made the 24th of April is not discharged. R. 2 Mod. 280.

[An allegation that a man resided at a particular place until a certain day, does not imply that he left it on that day. R. 1 T. 477.]

[The word "until," in general, excludes the day to which it is applied. D. Ld. Raym. 210.]

[But, in stating the holding of parliaments, if the parliament is stated to have been held until a particular day, such day is to be included. D. Ld. Raym. 210.]

(A 11.) Copulative.

So, words shall be expounded *conjunctim*, where they are with a copulative; as, if A. leases for twenty years, if A. and B. so long live; if one of them dies, the lease determines. R. 2 Cro. 378. [Pollex. 645.]

[So, upon a *certiorari* to remove all proceedings against several persons, joint-proceedings only against all them, shall be removed. Ld. Raym. 609.]

So, words in the disjunctive shall be taken *copulative*, where the intent requires it: as, if a devise be after the death of him and his wife to the issue living at the death of him, his wife, or the survivor; the issue does not take, though living at the death of the testator, if it was not living at the death of the wife; and therefore, or shall be taken for and, otherwise the word survivor is superfluous. R. 2 Ver. 389. [Moor. 422. 3 Atk. 390. 1 Wils. 140. 2 Str. 1175. 3 T. R. 470. 4 T. R. 442.]

(A 12.) Disjunctive.

So, words shall be construed disjunctively to answer the intent of the parties: as, if a covenant be to make an assurance by A. and B. *et erum utrumque*

*utrumque* devised; and assurance, devised by them severally, ought to be executed. R. 1 And. 55. [1 Leon. 74.]

If an obligation be to pay, if a ship, goods, or the obligor return safe; it shall be construed to pay, when any of them return safe, which first happens. R. 1 Lev. 55.

If a covenant be, that a lessee repair a house during the term, or within three months after upon notice; they shall be construed distinct covenants, and the lessor shall have election to sue for not repairing during the term, or to give notice afterwards, and then sue if he do not repair within three months. R. 2 Rol. 250.

[A conjunctive may be construed disjunctively, or a disjunctive, conjunctively, either in a will or deed, where it is essential in order to effectuate the intention of the parties. R. 3 T. R. 470.]

[Therefore, where a man surrendered an estate to the use of himself for life; remainder to his widow during widowhood; remainder to his son for life; remainder to the issue of his body, in case the son should die before him, or without issue of his body, remainder over; it was held the word "or" should be taken, as if it had been "and." 3 T. R. 470. P. C.]

[So, upon a devise to I. S. his heirs, but if he should die under 21, or without issue at his death, the house of lords held in affirmation of the judgments of C. B. and B. R. in Ireland, that "or" should be read as "and." 2 K. R. 38. P. C.]

[Upon an allegation that I. S. was not at A., (meaning A. in B.) when in truth he was at A. aforesaid, though the *innuendo* is not properly introduced for want of previously shewing that there was such a place as A. in B., the word "aforesaid" shall not refer to A. in B., and the words "when in truth he was at A. aforesaid," shall be taken to import that he was at A. in B. Ld. Raym. 256.]

### (A 13.) Distributive.

So, words shall be expounded *distributive*, *reddendo singula singulis*: as, if a demise be to A. for ten, and of other land to B. for twenty years, and after the determination of the several leases, to C.; he shall have the land demised to A. immediately after his lease determines, though the other lease continues. R. 5 Co. 7. b. Vide Estates, (B 20.)

If a devise be of legacies to a woman and four issues of her eldest son, upon condition, that if they do not release respectively, when they become of full age all right to his estate, their legacies shall be void; it shall be *distributive*, that the legacy of each, who does not release, shall be void. R. 2 Ver. 478.

### (A 14.) Relative: — When referred to the next antecedent.

Relative words, generally, are referred to the next antecedent, where the intent upon the whole deed does not appear to the contrary: as, if an obligation be, 1 April, 2 El., to pay 21 April next: the word relates to the month, and not to the day: for the payment shall be, 21 April, 3 El. R. 2 Rol. 351. l. 30. But afterwards R. cont. there, l. 35. 2 Cro. 646. 677.

If

If a grant be of land in the parish of B., which has three vills, A., B., and C., and of the tithes in A. and B., and of all tenements in B. aforesaid; this refers to the parish of B., and the tenements in C. pass. R. 2 Rol. 251. l. 15.

If A. be bound to pay 10*l.* before 20 Oct., (if B. be then living,) and that he levy a fine, &c. that he refers to B., who is last named, though in a parenthesis. R. 2 Rol. 252. l. 15.

In *assumpsit* brought in an inferior court, if the plaintiff declares that the defendant, in consideration of carrying the goods of B. to London, *ad tunc et ibidem* assumed, &c.; *ibidem* refers to London, and so, the undertaking being out of the jurisdiction, it is bad. R. 2 Rol. 252. l. 20.

[The words "then and there" refer to the time and place last before mentioned. R. Ld. Raym. 577.]

[Thus, in an action against a hackney-coachman for plying on a Sunday, when he was not appointed by the commissioners, where the declaration stated that defendant on 7th April 1700, being Sunday, at, &c. drove his coach *contra formam statuti* made at Westminster, 7th November 1693, then and there not being appointed; the court held the words "then and there" referred to 7th November 1693 at Westminster. Ld. Raym. 577. P. C.]

[The word "there" in pleading will refer to the village mentioned in the pleadings, if it be applied to an issuable fact. R. Ld. Raym. 121.]

[Thus, in trespass for entering his close, called A. at the parish of B. and seizing his cattle there found; the court held the word "there" applied to the parish of B., not to the close. Ibid. P. C.]

[In an award, that on a particular day certain things specified in the award should be done, that "then" each party should execute mutual leases, the word "then" refers to the day. Ld. Raym. 123.]

[The word "aforesaid" does not necessarily refer to the last antecedent. R. Ld. Raym. 405.]

[Thus, where a declaration stated that the plaintiff was possessed of a house for ten years, that from time whereof, &c. all inhabitants within the place had had a particular right, and that by reason thereof he had the right during all the time "aforesaid;" the word "aforesaid" was held to apply to the time he was possessed of the house, not to the time the custom had existed. Ibid. P. C.]

Covenant upon an indenture, reciting other indentures, *cumque per unam alium indenturam &c. testatum est per indentur. præd.*, the word *præd.* relates to the last indenture. Semb. Sho. 72.

If an obligation, 5th June, with a condition to pay on the first day of Trinity term next, which began the 7th June, it ought to be paid the 7th of the same June, though the essoign-day of Trinity term was 3d June. R. Sav. 124.

### (A 15.) When not.

But where the intent appears otherwise, the reference shall be to support the intent; as, if the king grant a manor in the parish of R. (which has in it three vills, R., A., and B.) and all tithes in R. and A., and all his lands in R. aforesaid; this refers to the parish of R. and not to the vill, though it was the next antecedent. Dub. 2 Rol. 251. l. 15.



So, if an obligation, the 23d April be, to pay 24th April next, it shall be referred to the month or to the day, as the intent is found to be. 2 Rol. 251. l. 30. 35.

Submission to an award, *ita quod factum sit*, on this side the 8th of June, before four o'clock of the same day, the word day does not refer to the 8th June, but to the day before, when the award is made. R. 2 Rol. 251. l. 50. Vide 3 Lev. 239.

If a writ be teste'd 1<sup>o</sup> Martii, (which was after Lent began,) returnable in *quarta septimana quadragesimæ prox. futur.*, the words, "*prox. futur.*" relate to the fourth week, and not to Lent. R. Mo. 365. Poph. 190.

If a feoffment be to B. senior, to the use of B. junior, for life, and afterwards a remainder is limited to the heirs of the said B., he who was last named shall be understood. Pol. 63.

If a condition be, to pay where A. dies before Michaelmas without issue then living, it shall be referred to the death. Per three J. Dy. 15. a.

If an information *apud W. in com. M. says, quod A. de B. in com. S. apud W. in com. M. implacitasset*, &c. it shall be referred to the county of M. 3 Sal. 199.

[In declarations, "the county aforesaid," where more than one county is named, always refer to the county named in the margin. 2 Bl. 847.]

(A 16.) When the reference shall be to all the words precedent.

So, indefinite words are tantamount to universal, and refer to all the particulars precedent: as, if a man devise A. to his wife, and B. to his wife, and afterwards devise the same lands to his son; this refers to all the foregoing lands, and not to those in B. only. Semb. 1 Vent. 368. Vide post, (A 20.)

So, words at the end of a sentence, which may be applied to all the preceding, shall be restrictive and relative to all the preceding; as, if the king grant the rectory of L. *cum decimis spectan. ac omnes terras et tenementa in tenura B. sub annuali redditu 3l.*, the last words refer to the rectory as well as all the lands; and if they are not in the tenure of B. at the same rent, the grant is void. R. per three J. 2 Cro. 34.

So, if a covenant be, that he is seised in fee according to the indenture of his purchase; the covenant is, that he is seised in fee absolutely, for the reference to the indenture imports only the certainty of the estate, not the title. R. 1 Lev. 40.

(A 17.) When not.

So, if there are distinct clauses, restrictive or explanatory words at the end of the last clause do not refer to the preceding; as, a grant of all tithes *infra dominicum de B. ac omnes alias decimas monasterio de B. spectan. quæ fuer collect. per ballivum ejusdem monasterii*; tithes, *infra dominicum de B.* pass, though not collected by the bailiff of the abbey, for that refers only to all the other tithes, which is a distinct clause. R. 2 Cro. 48. Mo. 754, 755.

So,

So, a grant of lands in A. *aut. alibi in com. B. monasterio de C. spectan.* the words, *monasterio de C. spectan.* refer only to lands *alibi in com. B. per quosdam.* 2 Cro. 51.

(A 18.) Words expounded according to the intent of the parties : — With regard to the context.

The general construction of words ought to be for supporting the intention of the parties ; and therefore, if a devise be to his daughter A., upon condition that she marry D., and if she refuses, or marries another before her age of twenty-one years, to B. his daughter ; D. dies, and A. afterwards marries another before her age of twenty-one years, the estate does not go to B., for the intent appears that she shall not marry another to prevent her marriage with D., but when this becomes impossible by the act of God, her marriage with another does not lose the estate. R. 4 Mod. 68. Vide Covenant, (D 1.) — Parliament, (R 10.)

A promise in consideration, *quod ulterius non prosequeretur B., an averment, quod prosequi abstinuit et hucusque aliququaliter abstinet*, is sufficient : for *aliququaliter*, in regard to the context, imports *quod omnino abstinet.* R. 2 Rol. 246. l. 50.

A writ to the escheator says, *quod tam escheator quam jurat. sigilla sua alternatim appon.* ; both ought to seal the same return, and not the escheator one, and the jurors the other. R. 2 Rol. 248. l. 10. Hob. 253.

In a lease of land, except a wood, the lessor covenants that the lessee shall take firebote *super præmissa* ; he shall not take it in the wood excepted. R. 1 Leo. 117.

If a covenant be, that he hath not done nor will do any act to disturb the plaintiff, but that he will hold without any disturbance ; the last shall be taken with reference to the former words, and it is not a breach if he be disturbed without his act. R. Mo. 58.

If a wager be, whether king W. takes Ireland into his power by his present or any other title before 30 Dec., it shall be understood of his actual administration, because, by his present or other title, shews the intent was not such administration as he then had. R. Sho. 182.

[If it is agreed, "that several causes shall be bound by the verdict given in one," it means such a verdict as the court thinks ought to stand ; therefore, if after verdict a new trial is granted, the others are not bound by the old verdict. 3 B. M. 1477.]

[Words in an agreement, "that A. shall hold and enjoy," &c. if not accompanied by restraining words, operate as words of present demise. Secus, if they be followed by others which shew that the parties intended that there should be a future lease. The whole must depend on the intention of the parties. 5 T. R. 163.]

[Demise from A. to B. for twenty-one years, if both should so long live ; but if either should die before the end of the said term, then the heirs, executors, &c. of the person so dying should give twelve months' notice to quit, &c. It was holden, that the lease could only be determined by twelve months' notice given, by the representatives of the party dying before the end of the term, and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it. Willes, 43.]

So, synonymous covenants. Vide Covenant, (D 2.)

(A 19.)

## (A 19.) With regard to a recital.

So, the construction of a deed shall be with regard to a recital; as, if a lease be to A. except a close; and A. covenants to make all grants, agreements, *contenta aut recitata*, &c. it will be a breach if he disturbs the lessor in the close excepted. 1 Leo. 117.

But a recital does not confine subsequent words by which the intent appears more large; as, if a condition of an obligation recites, whereas a ship is bound to A. and is to return to the port of B. or London, or any in England; the obligor shall pay 20*l.* after the next return to the port of B. or L. or other port of England, or elsewhere where she makes her right discharge; if she makes a discharge at Venice, he ought to pay. R. 2 Rol. 247. l. 30.

## (A 20.) To a restriction annexed.

So, where restrictive words are annexed to the end of several expressions, all are restrained by it: as, if the king grant a portion of tithes in L., with all tithes in L. in the occupation of B.; the portion of other tithes do not pass, if they are not in the occupation of B. R. 2 Rol. 193. l. 5. Vide ante, (A 16.)

So, if a covenant be to assure such land as descends to him, the same land to be 40*l. per ann.*; he need not assign more than 40*l. per ann.* though more descends. Semb. 3 Leo. 27.

## (A 21.) Words shall be transposed.

So, words shall be transposed to support the intent of the parties: as, if a lease be 6th Aug. for twenty years, rendering rent *annuatim* at Lady-day and Michaelmas; there shall be a transposition, to Michaelmas and Lady-day: otherwise it cannot be paid *annuatim*. Co. L. 217. b. R. per two J.; Brown cont. Pl. Com. 171. Vide Abatement, (H 11.)

A devise to a woman for life if she does not marry, and if she marries to A. in tail, &c. shall be an estate in tail though she does not marry; for it shall be taken that A. shall enter immediately if she marries. R. 3 Lev. 125.

A devise to A. for life, and afterwards to his first, second, and other issues, remainder to B. for preserving estates; the words shall be transposed to make the devise to B. precedent to the disposition to the issues. R. 2 Ca. Ch. 10.

## (A 22.) Insensible, rejected.

If a lease be for forty years, and the lessor covenants that the lessee shall enjoy for the said term of eighty years; the words "eighty years" being insensible, shall be rejected, and the covenant shall be that he shall enjoy for the said term. Sav. 71.

If a *distringas* be returnable *tres Trin. nisi* the judge of assise come 3<sup>o</sup> *eiusdem mensis Junii*, where no such month was mentioned before, *eiusdem* shall be rejected. R. Hard. 330.

But

But if by the rejection of insensible words, no sense remains, there the whole is void: as, if accompt be for *septem ponderibus cere*, it is utterly insensible; for *pondus ponderis* is a weight, *pondus pondi*, a pound. R. 2 Rol. 247. l. 15.

(A 23.) General, restrained.

So, always a construction shall be made of words, if it can, to support that which seems to be the intent of the parties; as, a lease *pro octoginta et terdecim annis*, shall be construed for 93 years, and not for 80 and 30. R. Cro. Car. 386. 2 Rol. 247. l. 5. Vide ante, (A 20.)

A devise to A. for life, with power six months before his death, to make a lease for six years; he may make a lease at any time before his death, though it be not six months before; for the time of death being uncertain, the intent was, that he might make a lease for six years at any time. R. 2 Rol. 247. l. 20.

A lease by the king of a manor and profits of courts, (reciting a former lease of the manor,) to begin after the former lease, *reddendo inde extunc 78l. annually, viz. 36l. for the manor, 6l. for the profits, &c.* The rent commences upon the commencement of each lease; for, for the profits not leased before, it commences immediately; for the manor, after the former lease. R. 2 Rol. 252. l. 5.

An obligation, with a condition to meet at A., there to choose arbitrators, who, with arbitrators of the plaintiff, might determine all matters between them; it is not sufficient to be there the last minute of the day: for it ought to be understood, that he shall be there in time to determine all differences. R. Mo. 545.

If a condition be, *anno 1648*, to pay when the king is restored; it shall be understood of King Charles I. Per two J. 1 Sid. 314.

But where words have no ambiguity, an exposition shall not be made against the express words.

So, general words are not restrained by restrictive added *in majorem cautelam*: as, if the king grant a manor belonging to the priory of C., and all lands, tenements, and hereditaments to the said priory of C. appertaining, and all liberties, piscaries, &c. *eidem manerio spectan.*; a piscary, &c. in gross, appertaining to the priory, passes; for being comprehended in the word hereditaments, it shall not be excluded by the words, *eidem manerio spectan.*, which were added for greater caution. R. 2 Rol. 186. l. 5.

So, if the king grant all lands, &c. in L., and afterwards grant the rectory of L., (where there were two rectories,) and all lands, tenements, and hereditaments, &c. the rectories pass by the general words. 2 Rol. 193. l. 10.

So, general words are not restrained by affirmative words more restrictive; as, if a man grant to A. all the wood in his manor, and afterwards covenant that A. shall take all the wood within five years; he shall not be confined for five years for taking the wood. R. Hob. 173.

So, a grant of *5l. per ann.* to husband and wife for their lives, and if the wife survives, that she shall have *3l. per ann.*; if she survives, she shall have *5l. per ann.* Hob. 173.

A covenant, that a lessee shall take *botes* by assignment; he may take them without assignment. Hob. 173.

For more concerning words, and the exposition of them, vide Abatement, (H 3. 11.) — Action upon the Case for Defamation, per totum. — Chancery, (3 A. 8. — 3 Y 1., &c.) — Condition. — Covenant, (D 1, 2. — G 2.) — Devise, (N 1., &c.) — Estates, (A 2. — B 3. 12. 19.) — Fait, (E 5.) — Feoffment, (A 3.) — Franchises, (F 6.) — Garranty (A). — Grant, (E 1., &c.) — Libel. — Obligation, (B 1., &c.) — Pardon (C — D.) — Parliament, (R 10., &c.) — Pleader, (C 25., &c. 45., &c. 77. — V 5. — 2 L 1., &c.) — Poirar, (A 2. — B 1., &c.) — Rent, (B 2.) — Uses, (L 3.)

## PARSON.

(A) Parson, who shall be. *infra*.

(B) Must be *infra sacros ordines*.

(B 1.) *Qui sunt sacri ordines*. *infra*.

(B 2.) What shall be a lawful ordination. *infra*.

(C) Must declare his assent to the book of common prayer. p. 339.

(A) Parson, who shall be.

A Parson is he *qui personam gerit ecclesiæ*. Co. L. 300. a. Vide Ecclesiastical Persons, (C 6.)

Who may be, or not, and his interest in the rectory. Vide Ecclesiastical Persons, (C 7, 8, 9.)

(B) Must be *infra sacros ordines*.

(B 1.) *Qui sunt sacri ordines*.

By the st. 13 & 14 Car. 2. 4. no person shall be capable of being admitted to any parsonage, vicarage, benefice, &c. before he be ordained priests, according to the form thereby established, unless he have before episcopal ordination, on pain of 100*l.*, &c. and disability to take the order of priest for a year.

*Sacri ordines, strictè loquendo, sunt 4 tantum, viz. subdiaconatus, diaconatus, presbyteratus, et episcopatus.* Lind. 27. Verb. Sacros Ordines.

*Et in clausulâ penali, verba non debent extendi ad minores ordines.* Lind. 27. Verb. Sacros Ordines.

*Large tamen loquendo, omnes ordines, etiam minores (viz. cantores, acoliti, exorcistæ, et ostiarii) dicuntur sacri.* Lind. 27. Verb. Sacros Ordines.

If a man takes a benefice, not having episcopal ordination, it shall be, *ipso facto*, void. 1 Mod. 11.

(B 2.) What shall be a lawful ordination.

By the st. 5 & 6. Ed. 6. 1. (which was repealed by the st. 1 M. 2. and afterwards revived by the st. 1 El. 2.) to the book of common prayer, was added a form of making and consecrating archbishops, bishops, priests, and deacons, to be of like force and authority as the said book.

And

*Must declare his assent to the book of common prayer.* 339

And by the st. 8 El. 1. the same form shall be of force, and shall be used and observed in all places, &c.

By the st. 13 & 14 Car. 2. 4. the book of common prayer, with the form of making, ordaining, and consecrating bishops, priests, and deacons, is recommended by the king to the parliament, to be used by all that make or consecrate bishops, priests, and deacons; and the same is established by that act.

By the 36th article of the 39 articles established *anno* 1562, it was declared, that the book of consecration of archbishops and bishops, and ordaining priests and deacons set forth in the time of king Ed. 6. doth contain all things necessary for such consecration, and ordaining, &c.

And by the st. 13 & 14 Car. 2. 4. s. 30, 31. it is enacted, that all subscriptions of the said article shall be taken and applied to the form thereby established.

Vide Ecclesiastical Persons, (C 8.) — Esglise, (N 10.)

### (C) *Must declare his assent to the book of common prayer.*

So, by the st. 13 & 14 Car. 2. 4. s. 6. every person put into an ecclesiastical benefice, or promotion, shall in the church, &c. belonging to his benefice, within two months after actual possession, &c. on the Lord's day, publicly read morning and evening prayers appointed by the book of common prayer, and afterwards, before the congregation, declare his unfeigned assent and consent to the use of all things therein contained, in the words, I declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, &c.

And he who neglects it within the said time (unless let by impediment allowed by the ordinary, and then within one month after the impediment is removed) shall be *ipso facto* deprived of all his ecclesiastical promotions. And the patron, or donor, may present, &c. as if he were dead.

Every parson, vicar, &c. ought to declare his assent, &c. within this act.

So, a stipendiary priest, provided by the lessee of a college, deanery, &c. though no presentation is required; but a nomination to the dean, and approbation by him. R. 3 Lev. 83.

[By stat. 23 G. 2. c. 28. it is declared, that the bishop's allowance of lawful impediment for not reading the common prayer, extends to not reading the declaration of assent.]

But, a man deprived for not giving his assent within two months, is not disabled to be presented *de novo*. 3 Lev. 8.

And, if a stipendiary priest continues in the exercise of his function, after the two months, with the approbation of the nominor, and dean who ought to approve; this amounts to a new nomination; and if he gives his assent, &c. at any time, it is sufficient. R. 3 Lev. 83.

Vide Dismes. — Esglise.

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## PARSONAGE.

Vide ECCLESIASTICAL PERSONS, (C 6, &c.) — PARSON.

## PARTICULARS, BILL OF.

## PARTIALITY.

Vide CHANCERY, (2 K 6.)

## PARTICEPS CRIMINIS.

Vide CHANCERY, (3 M 7. — 4 W 28, 29.)

## PARTICULAR ESTATE.

Vide ESTATES, (B 13., &amp;c.)

## [PARTICULARS, BILL OF.]

[A plaintiff declaring *in indebitatus assumpsit*, is obliged to give a particular of his demand. 3 Burr. 1389.]

[In an action by vendee against vendor, for that the abstract of title delivered was insufficient, defective, and objectionable, the plaintiff is compellable to give a particular of all such objections as depend upon matter of fact. 3 B. & P. 246.]

[Where the forfeiture of a lease has been incurred by breach of covenant: in an ejectment thereon, the plaintiff is compellable to be a particular, specifying as well on what breaches of covenant he relies, as the times when the forfeiture occurred. 6 T. R. 597.]

[The defendant is entitled to receive from the plaintiff a particular of his demand, although he may have received a statement of it before the action was brought. Wightw. 78.]

[A defendant must appear before he can demand a bill of particulars. 1 B. & P. 378.]

[The time for pleading continues to run, notwithstanding an order for a particular. 3 B. & P. 363.]

[To deliver a particular under a judge's order, as general as the declaration, is a contempt of the court. 1 Taunt. 353.]

[It is sufficient that a bill of particulars specify the occasion whence the right arises, without technically describing the right to be insisted on as resulting from it. 4 Taunt. 189.]

[Under a bill of particulars as for goods sold to the defendant, evidence of goods sold by the defendant, as the plaintiff's agent, is inadmissible. 2 B. & P. 243.]

[A mistake of the date in a bill of particulars is immaterial where it could not mislead. 2 Taunt. 224.]

[A misrepresentation, through mistake, in a bill of particulars, which in other respects apprized the defendant with sufficient certainty of the cause of action, is immaterial, unless he can show that he was misled by it. Thus, a bill of particulars, in debt for rent, stating that the premises are at X. instead of at Y., will be no ground for nonsuit, unless the defendant can prove that he held other premises at X. of the plaintiff. 3 M. & S. 380.]

[Where a verdict, according to the justice of the case, is taken for a sum exceeding the particular, without objection, either at the trial or subse-

subsequent argument, the judgment entered thereon will not afterwards be reduced. 2 Taunt. 285.]

[Where a particular has been given under a judge's order, a second particular delivered without an order may be treated as a nullity. 1 Taunt. 353.]

[After delivering a bill of particulars, plaintiff must wait twenty-four hours before he can sign judgment as for want of a plea. 2 N. R. 361.]

[The particular of the defendant's set-off is not admissible evidence of the existence of a debt from the defendant to the plaintiff. 1 Mars. 38. 5 Taunt. 228.]

## PARTITION.

Vide CHANCERY, (4 E). — PARCENER, (C 1., &c.) — PLEADER, (3 F 1., &c.)

## PARTNERS AND PART-OWNERS.

Vide ABATEMENT, (E 12. — F 8.) — CHANCERY, (3 V 4. 6, 7.) — MERCHANT, (D). — NAVIGATION, (I 3.)

## PARTRIDGES.

Vide JUSTICES OF PEACE, (B 46.)

## PARTY.

### Parties to an agreement or deed.

Vide CHANCERY, (2 C 13. 15.) — FAIT, (B 1. — C 2. — D 2. — E 3.)

### Parties to an action, or suit.

Vide ABATEMENT, (E 8., &c. — F 4., &c.) — ACTION, (B 1., &c. — C 1., &c.) — BARON AND FEME (V &c.) — CHANCERY, (E 2. — T. 3. — 2 M 1, 2. — 3 V 1, 2.) — PARCENER, (A 4, 5.)

### Parties and privies.

Vide FINE, (I 1.) — PLEADER, (O 1., &c.)

### Act of party.

Vide ABATEMENT (H 41., &c. — O).

### Judge and party.

Vide JUSTICES, (I 3.)

### Misdemeanor of jury, or party.

Vide PLEADER, (S 46, 47.)

### Neglect of party

Vide RETURN, (D 2.)



**Prece partium.**

Vide ABATEMENT, (I 21.)

**[PARTY-WALL.]**

[The three months' notice, under st. 14 Geo. 3. c. 78. s. 38. (9. v.) of the building of a party-wall, is only requisite where the party is either ignorant of, or adverse to the building, not where he consents. 5 T. R. 130.]

[The separate owners of adjoining tenements are owners in severalty, each half, of the party-wall, though built at their joint expense. 5 Taunt. 20.]

[A., a builder, proposes to B., the occupier of the adjoining house, to build a party-wall, and states the expense; B. answers, "Very well, I expect to pay what is right and fair," and the wall is built. Held, that A. was entitled to recover from B. his share of the expense, without reference to the building act. 14 G. 3. c. 78. 2 Mars. 435. 7 Taunt. 158. *Semble*, that B. having asked 300*l.* for his lease, he was to be considered as owner of the improved rent within the act. *Ibid.*]

[By stat. 14 G. 3. c. 78. s. 41. the expense of a party-wall is thrown upon the owner of the improved rent; which term, "improved rent," stands contradistinguished from some other rent; therefore, where none other exists but that originally reserved, the original lessor is the party liable; as, where the lessee assigns, (not under-lets) the premises. 3 T. R. 458.]

[In deciding the question who, as owner of the improved rent, is liable to the expenses of a party-wall, the covenants (as for repairs) between the parties, cannot be taken into the account. 1 B. & P. 303.]

[The landlord of a house rack-rented, not the lessee who has improved it, is liable to the expense of a party-wall, since the words of the statute 14 G. 3. c. 78. s. 41., "owner of the improved rent," are not to be construed "owner of the improved value." 8 T. R. 214.]

[If premises held under a building lease are afterwards let at an improved rent, the owner of that rent, and not the owner of the ground-rent, is liable for the expense of a party-wall under st. 14 G. 3. c. 78. s. 41. 5 T. R. 130.]

[Where a house rack-rented is under-let at an advanced rent, the first lessee is liable for the expenses of a party-wall. 1 B. & P. 303.]

[Neither possession of a house, nor the demise of a house, in consideration of the cost the tenant has incurred in building it, proves that the tenant was, at the time of building it, the owner of the improved rent, to subject him to contribution to a party-wall previously built. 6 Taunt. 249.]

[The regulations prescribed by sect. 41. of st. 14 G. 2. c. 78. to be observed previous to an action for the expenses of a party-wall, apply as well where the owner himself as a tenant is the occupier of the house liable. 2 Taunt. 62.]

[If, in trespass against the owner of a house adjoining to the plaintiffs, in the metropolis, for taking down his party-wall, and building upon it, it appears at the trial that the defendant was authorised in what he had done, by the provisions of the building act, 14 G. 3. c. 78., and there-  
upon

upon the plaintiff be non-suited, the defendant will be entitled to treble costs. 9 East, 322.]

[Under the party-wall act, a landlord is bound to reimburse his tenant, only in respect of money paid to the adjoining owner. 10 East, 227.]

[Under a stipulation in a lease, that, "it is the true intent and meaning of these presents, and of the parties hereto, that the landlord shall receive the yearly rent of 60*l.* hereby reserved, in net money, without any deduction, defalcation, or allowance out of the same on any account whatsoever," coupled with a covenant by the tenant, "to bear a reasonable share and proportion of or for and towards supporting, repairing, amending, and cleansing all party-walls belonging, or which hereafter shall belong to the premises," the tenant, not the landlord, is liable to contribute to a party-wall built during the term. 8 T. R. 602.]

[A person who has lights in an edifice carried up above a party-wall, not warranted by the building-act, 14 G. 3. c. 78., may nevertheless recover against the owner of adjoining land, who contributed to the party-wall, for obstructing the plaintiff's lights. 5 Taunt. 465.]

## PATENT.

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### (A) Grant by the king ; how made, &c.

The king cannot grant, or take any thing, but by matter of record. Vide *Prærogative*.

[A patent was granted to A. B. for a new-invented method of using an old engine in a more beneficial manner than was before known. The specification stated, that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending certain engines by him invented, extended to A. B., for a longer term than fourteen years, the privilege of making, constructing, and selling the said engines. Held, that the invention was the subject of a patent, and that the patentee's right, under the patent and act of parliament, was valid. 8 T. R. 95. 2 H. B. 463.; the court was divided. Loft. 395.]

[The patent must not be more extensive than the invention. If, therefore, the invention consist in an addition or improvement only, and the patent be for the whole machine, or manufacture, it is void. 11 East, 109.]

[If a patent is obtained for making several things by one process, and the process fails in producing any one, the patent is void. The consideration of the patentee's exclusive right was the producing the several things specified, and the whole of them ; now a part of that consideration has failed, and with it his right. 1 T. R. 602.]

### (B) The form of letters patent.

The king in his patents was named in the singular number, till the time of king John: but since, has used the plural number. 2 Inst. 2.

So, the direction of patents, till R. 2., was (and now is, of patents of dignity) *omnibus archiepiscopis, ducibus, marchionibus, comitibus, episcopis, &c.* But in other patents it is now, *omnibus ad quos præsentēs litteræ venerint, &c.* 2 Inst. 1.

So, the king, by his patent, ought to make a grant of lands.

But, by the st. 31 H. 8. 13. s. 19. a patent, by which the king bargained and sold lands which belonged to a monastery, (without the word grant,) being made after 4 Feb. 27 H. 8. and within three months after the st. 31 H. 8. shall be good. R. Mo. 681.

So, the clause of his *testibus* was used temp. H. 3. Ed. 1, 2 & 3. and before, in grants of franchises and inheritances. 2 Inst. 77.

And is now used in patents for creation of dignity. 2 Inst. 77. 1.

But temp. R. 2. *teste meipso* was inserted in the place of his *testibus*, in other patents. 2 Inst. 78.

### (C) Under

## (C) Under what seal made.

## (C 1.) The several seals of the king.

William the Conqueror sealed his patents with an impression upon wax. 2 Rol. (180.) l. 45. 181. l. 30. Vide *Fait*, (A 2.)

So, William Rufus. (Vide 2 Rol. 181. l. 36.)

Rich. I. first used a seal of arms for his seal. 2 Rol. 181. l. 21.

And after his return from Jerusalem, changed his arms from two lions combatant to three lions passant. 2 Rol. 181. l. 25.

The law takes notice of three seals of the king, the great seal, the privy seal, and the signet. 2 Inst. 554.

If mention be of the king's seal generally, it shall be understood of the great seal. 2 Inst. 555.

The great seal is in the custody of the chancellor, the privy seal in the custody of the clerk, or lord-keeper of the privy seal, and the signet in the custody of the principal secretary, who has four clerks of the signet. 2 Inst. 554, 555, 556.

## (C 2.) When under the great seal.

By the common law, no grant of the king is available, or pleadable, unless under the great seal. R. 2 Co. 16. b. 2 Rol. 182. l. 5.

And therefore, if the king presents to an advowson, to which he has a right *jure coronæ*, unless under the great seal, it shall be void. R. Cro. Car. 99.

So, a grant of all inheritances, or chattels real, ought to be by the great seal. Mo. 476.

A grant of a protection, or *essoine de servitio regis*. 2 Inst. 555. Vide post, (C 5.)

So, a grant of an office to another in fee, or for life, &c. R. 11 Co. 4. a.

So, an office, or commission for entitling the king, ought to be under the great seal. R. Cro. Car. 173.

So, a grant of a ward ought to be under the great seal. Cro. El. 851.

So, the king's writ ought to be sealed with the great seal. 2 Co. 17. b.

For, by the st. *Art. super Chartas*, 28 Ed. 1. 6. under the little seal shall not issue a writ which touches the common law. Vide post, (C 5.)

A grant under the great seal shall be good, where it might have been made under another seal: as, if the king presents to a church of his ward, under the great seal; though it might have been made under the seal of the court of wards. R. Cro. Car. 99.

[The king may create an Irish peer under the great seal of Great Britain. Ld. Raym. 13.]

If he grants lands within the duchy of Lancaster, rendering rent to the court of augmentations; though such rent was payable before to the duke of Lancaster; and the grantee shall pay only the latter rent. Dal. 9.

[It is one of the provisions of the act of union 40 G. 3. c. 67.; that the great seal of Ireland may, if his majesty shall so think fit, after the union be used in like manner as before the union.]

## (C 3.) When under the exchequer seal.

But, by the course of the exchequer, a lease for years by the king, by the exchequer seal, will be good. R. 2 Co. 16 b. 2 Rol. 182. l. 35. R. 1 And. 191. 2 Cro. 109.

So, a lease for lives. R. 2 Rol. 182. l. 45. Cro. Car. 513.; for it is the ancient usage of the court. Dub. but no judgment. F, g. 90. 290.

So, the grant of the benefit of an outlawry. R. 2 Rol. 182. l. 30.

So, the king may make any one bailiff of his manor, by patent under the exchequer seal. 2 Rol. 182. l. 25.

So, a commission under the exchequer seal, for the information of the king only, will be good. R. Cro. Car. 173.

So, the custody of lands forfeited for attainder, &c. may be under the exchequer seal. R. 2 Cro. 109.

So, a grant under the seal of the court of wards, of a thing which related to his ward, was good: as, a presentation to an advowson of his ward. R. Cro. Car. 99. R. 2 Cro. 248.

So, a lease by the king of the lands of the ward, during the ward's minority. R. Cro. El. 851.

But a presentation under the exchequer seal is not good. 2 Cro. 248.

## (C 4.) Or the duchy seal.

So, a grant under the duchy seal, of lands within the county palatine of Lancaster, shall be as good as if it was under the seal of the county palatine of Lancaster. Semb. 1 Ver. 295. R. 1 Lev. 28.

So, leases in possession or reversion, of lands within the county palatine, under the duchy seal, are of the same validity as a lease of lands of the crown under the great seal. 4 Inst. 209.

And by the st. 3 H. 7. grants of lands, advowsons, &c. parcel of the duchy of Lancaster, are void, if not under the duchy seal. Vide Plo. 218.

And therefore, a grant under the great seal only is not good. Hard. 171.

So, a grant to a corporation of lands within the duchy, is good under the duchy seal.

So, the king may make a corporation under the duchy seal, within the county palatine; though not out of it. Mo. 167. 2 Leo. 151.

So, a grant of the next avoidance of a church, the advowson of which belongs to the duchy, under the great seal, is not good; for it ought to be under the duchy seal. 2 Rol. 182. l. 20.

So, a presentation to an advowson, parcel of the duchy, ought to be under the duchy seal. R. cont. that it may be under the great seal; for it is a fruit fallen, and not within the st. 3 H. 7. being but a recommendation of a clerk to the ordinary, which may be by parol. 1 Rol. 182. l. 15. Mo. 874. 1 Brown, 162.

## (C 5.) Or, under the privy seal.

So, the king may dispose of a chattel under his privy seal: as, he may issue his treasure under the great or privy seal. 11 Co. 92. 2 Rol. 183. l. 7. Mo. 476. 4 Inst. 116. 2 Inst. 555.

Or, make an obligation under his privy seal. 2 Rol. 183. l. 15.

Or, discharge a debt. 2 Rol. 183. l. 30. Hard. 204. Sav. 22.

Though it be a debt upon a recognizance forfeited. 2 Rol. 183. l. 25. 2 Inst. 555.

So, by the privy seal, the king may dispose armour, horses, or other personal things. Mo. 476.

Or, present to an avoidance: for an interest does not pass; but it is the nomination of a clerk to the ordinary, which may be by parol. 2 Cro. 248.

So, the king may grant, by patent under his privy seal, to make a general attorney in all pleas. 2 Rol. 183. l. 12. F. N. B. 26. A.

Or, may commit to another the office of chancellor in Ireland. 2 Rol. 183. l. 17.

Or, make a warrant for a patent. Semb. Dy. 133. b.

So, the king may inhibit, by private seal, *quod ne exeat regnum*. 2 Rol. 183. l. 28. 2 Co. 17. b.

Or, require the levying of his debts. Mad. 593.

Or, make a *supersedeas* of process in the case of the king. 2 Inst. 555.

Or, grant a *nisi prius*, where the king is a party. Ibid.

Or, allow a plea against the king. Ibid.

So, in other small matters which do not cause delay to the subject. Ibid.

But by the st. *Art. super chartas* 6. *de south le petit ne isserra desormes nul briefe que touche le common ley*. 2 Rol. 183. l. 20. 2 Inst. 554.

So, a protection or warrant of *essoigne*, under the private seal, is of no force. 2 Rol. 183. l. 30. Vide ante, (C 2.)

Nor, a grant of an office. R. 11 Co. 4. a. Vide ante (C 2.)

### (C 6.) Under the privy signet.

So, the king may forbid to go out of the realm, under the privy signet. F. N. B. 85. A. 2 Rol. 183. l. 51. 2 Co. 17. b. 2 Inst. 556.

But the privy signet is not a sufficient warrant to issue treasure. 11 Co. 92. 2 Rol. 183. l. 50. Mo. 476. 4 Inst. 116.

Nor, to discharge a debt. 2 Co. 17. b. 2 Rol. 183. l. 55.

Nor, to confess a bill in equity, which prays to be discharged from a debt or account. R. Hard. 204.

### (C 7.) Sign manual.

If the sign manual be to a grant or warrant, regularly it ought to be countersigned by a principal secretary of state, or the lords of the treasury. Eq. Ca. 54. 209.

And if it be but a direction for another act, as for letters patent to be made, &c. it is sufficient that it be countersigned. Eq. Ca. 54.

If it be of itself the principal act, it is countersigned, and also sealed by the signet, or privy seal. Eq. Ca. 54.

But where an act of parliament directs, that the king assign securities, &c. by his sign manual, it need not be countersigned. Eq. Ca. 209.

### (D) The manner of passing a patent; by the stat. 27 H. 8. 11.

If the king makes a grant by letters patent to be passed under the great seal, by the st. 27 H. 8. 11. every gift, grant, or writing made by the king, or any of his posterity, for that intent, to any person, signed

signed by his sign manual, before it pass any of his seals, or other process be made of the same, shall be brought to the king's principal secretary, or one of the clerks of the signet, to be passed at the office of the signet.

And this extends to any gift or grant, &c. to pass the great seal of England, Ireland, duchy of Lancaster, or other county-palatine, or principality of Wales, or by other process out of the exchequer; and to all grants, which the master of the wards, or surveyor-general of the king's lands, or other officer, by act of parliament, or the king's grant, made or to be made, can make. By the same statute.

By the same st. 27 H. 8. 11. one of the clerks of the signet, to whom such writing shall be delivered signed with the king's hand, shall, by warrant of the same bill in eight days after its receipt, (unless he have knowledge from the king's principal secretary, or otherwise, of the king's pleasure to the contrary,) make, in the king's name, letters of warrant under the hand of such clerk, and sealed with the king's signet, to the lord-keeper of the privy seal, for further process to be had therein. Vide 2 Inst. 556.

And the clerk of the privy seal, by examination of the warrant from the signet by the lord privy-seal, shall in eight days (unless commanded by the lord privy-seal to the contrary) make other letters of like warrant subscribed by the said clerk of the privy-seal, to the lord chancellor or keeper, chancellor of the duchy of Lancaster, or Ireland, treasurer and chamberlain of the exchequer, chamberlains of other county-palatine, or principality of Wales, or other officer, and every of them, by writing, and sealing with their seals in their respective custodies, letters patent or close, or other process requisite to such grants. By the same st. sect. 2.

And no clerk, or other person, shall make or procure any warrant, grant, &c. to be passed under the said seals in other fashion, on pain of 10*l.*, a moiety to the king, a moiety to him that will sue, &c. By the same stat. sect. 3.

Provided, not to prejudice warrants or precepts which the lord-treasurer, by virtue of his office, may direct immediately to the lord chancellor, &c. for making grants, or letters patent from the king, of any offices, farms of lands, &c. belonging to his nomination or disposition: but that the same may pass without signet or privy-seal, as before. By the same stat. sect. 5.

Provided, leases of lands, &c. in the county-palatine of Lancaster, or duchy of Lancaster, which the chancellor may grant in the king's name, may pass under the seal of the duchy, &c. as heretofore. By the same stat. sect. 6.

Provided, not to prejudice any, whom the king by express command directs to procure any thing to be sealed with the king's seals, concerning the king's private affairs, or the affairs of the realm; but such things may be written and sealed without warrant or fees, at the signet or privy seal. By the same stat. sect. 11.

But if a patent passes by bill signed, without a privy-seal, the patent is subscribed *per ipsum regem*, and the bill signed remains with the chancellor for his warrant. 8 Co. 18. b. The Prince's Case.

If it passes by bill signed and privy seal, the bill signed remains with the clerk of the signet, and an extract of it is made by the lord privy-seal,

seal, for making the privy seal, and the privy seal remains with the chancellor, and the patent is subscribed, *per breve de privato sigillo*. 8 Co. 18. b. The Prince's Case.

*Et auctoritate parliamenti* is added if it passes according to the stat. 27 H. 8. 11. 8 Co. 18. b. The Prince's Case.

If the king signs the patent itself in the upper part, and the signature goes with the great seal, it is subscribed *per ipsum regem manu suâ propria*. 8 Co. 118. b. The Prince's Case.

If it be made by authority of parliament, it is subscribed, *per ipsum regem et totum concilium in parlamento*. 8 Co. 19. a. The Prince's Case.

If a warrant for a patent be dated 31 Oct. 37 H. 8. and upon delivery to the chancellor, a memorandum is indorsed 1 Dec. *deliberat.*, omitting the year, yet being filed among the *memoranda* of the 37th year, and the patent being dated 1 Dec. *anno* 37 H. 8. it will be well. Semb. Dy. 133. b.

### (E) Inrolment of a patent.

So, a patent ought to be inrolled: otherwise it will be void. Vide post, (G).

And therefore, if a lease for years be acknowledged before commissioners, with a prayer that it be inrolled, and such prayer be indorsed, but the lease to the king never is inrolled in the life of the lessor, or of the king, it will be void. R. Lane, 35. 60. Vide infra.

[And the patent must be inrolled within the time limited; and if, by any mistake, it be not inrolled within that time, the date cannot be altered in favour of the patentee. 1 Brown, Ch. Rep. 578.]

If an officer surrender his office, and his surrender is recorded in court, yet if the patent is not delivered to be cancelled, the surrender is not effectual. Semb. Dy. 176. Vide post, (G) — Vide Officer, (K 9.)

So, if a patent be delivered to be cancelled, but there is no actual surrender, or cancelling, or *vacatur* entered of the inrolment of the patent, it is not sufficient. Semb. Lane, 14.

But if a deed, by which a grant is made to the king, be acknowledged before a master in chancery, and delivered to be inrolled, it is sufficient, though it be not inrolled, but put into a chest: for, if it be *in filaciis* or *memorandis* of the exchequer, it may be inrolled at any time. Cont. Dy. 355. a. But the opinion is denied there in marg. and said to be R. acc. Mo. 676. Hut. 1.

So, if a deed be inrolled, by mistake, before the day of the date. R. Mo. 676.

So, if it be acknowledged before the attorney of augmentations, out of court; for he is a judge of the court. Ibid.

So, if a prayer, that it be inrolled, be indorsed, it is sufficient; though it be not inrolled till after the death of the king. Semb. Lane. 32. But in this case it was R. cont. Lane, 35. 60. Vide supra.

[A patent is void, if the specification be ambiguous, or give directions which tend to mislead the public. 1 T. R. 602.]

[So, if the patentee say that by one process he can produce three things, and he fail in one. Ibid.]

[So, if the specification direct the same thing to be produced several ways,



ways, or by several different ingredients, and any one of them fail. *Ibid.* Vide Trade, (D 4.)]

[Not sufficient for the party applying for a patent merely to answer objections to its being granted, but must make out a proper case for it. 1 Ves. jun. 112.]

[On such application, the lord chancellor will take care that the king is not deceived, nor his object disappointed, and will represent the whole matter to his majesty; but will not decide on the merits of the various claimants. *Ibid.*]

[Will not sign a patent which does not put the parties under some control, although there be no *caveat*. *Ibid.*]

[Qu. Whether a patent can be the subject of a trust? *Ibid.* 129.]

Vide Estoppel (C).

[Where a patent is granted for improvements in a machine, for which a former patent had been granted, and whereof a specification had been inrolled, "so as a specification, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, should be inrolled;" a general specification, describing the whole machine, is sufficient. 11 East, 101.]

[Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct, in setting out the whole as the invention of the patentee. But, if a combination of a certain number of those parts have previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements; though the effect produced be different throughout. 2 Mars. 211.]

### [(E 1.) Infringement of a patent.]

[In actions for infringing patents, the plaintiff must show in what his invention consists, and that he has produced the effect proposed in the manner specified, though for this purpose slight evidence will be sufficient. 2 T. R. 606, 607.]

### [(E 2.) Statute 21 Jac. 1. c. 3.]

[Patentees for new inventions are left by 21 Jac. 1. c. 3. to the common law, and the remedies which follow the nature of their right. 4 Burr. 2323.]

## (F) Repeal of a patent.

(F 1.) In what cases it may be :— Where the patent was of a thing which the king could not grant.

If the king grant a thing not grantable, he, *jure regio*, for the advancement of justice and right, may have a *scire facias* for repealing his own letters patent. 4 Inst. 88.

As, if he grant lands which were conveyed to the king by covin to defeat a subject of his seigniority. Dy. 269. a.

If the king grant possessions, part of the duchy of Cornwall, his eldest son, when born, may have a *scire facias*, in the name of the king, for repealing it, without alleging fraud, &c. 2 Rol. 162. l. 5.

But if the patent be void in itself, *non concessit* may be pleaded to it,

it, without a *scire facias* to repeal it: as, if a commission be, that, upon a discovery of defective titles, a grant shall be made upon the warrant of the commissioners, without other warrant, and a patent is made by their warrant, of a thing out of their commission. R. 2 Rol. 191. l. 20.

[Patent even in fee cannot stand, if abused. 1 Ves. jun. 118.]

(F 2.) Or, founded upon a false suggestion.

So, if a grant be founded upon a false suggestion, the king, *jure regio*, may have a *scire facias* for repealing it. 4 Inst. 88. 2 Rol. 191. l. 35.

As, if it recites another to have an office, and grants it *cum post mortem, sursum redditionem, &c. vacare contigerit*; when he had then forfeited it. Dy. 197. b.

If a patent be for a market, *ad nocumentum* of another market. R. 3 Lev. 221.

Though a writ of *ad quod damnum* was executed before the patent passed, which found it not *ad nocumentum*. R. 2 Vent. 344.

(F 3.) Or, a forfeiture be committed.

So, if an officer makes a forfeiture of his office, granted by patent, the king may have a *scire facias* for repealing his patent. Dy. 197, 198. 211. a. Vide post, (F 5.) — Vide Officer, (K 11.)

And that, without an inquisition, or office found of the forfeiture. R. Dy. 211. a.

(F 4.) If there are two patents of the same thing; — When a *scire facias* lies by the patentee.

So, if the king grant, by his letters patent, the same thing to several persons, a *scire facias* lies for repealing the last patent. 4 Inst. 88.

And, in such case, the *scire facias* shall be brought by the first patentee. 4 Inst. 88. Dy. 197. b. 198. a. Adm. Dy. 133. b. 2 Rol. 191. l. 50. Cont. 39 H. 6. 33.

Though both patents are made of the reversion of an office, to take effect at the same time. Dy. 198. a.

And a *scire facias* by the last patentee shall not be allowed, though he seems to have the right with him. R. Dy. 276. b. 277. a. Vide post, (F 5.)

So, if a patent be made to the prejudice of another, he may have a *scire facias* to repeal it: as, if a market, fair, &c. be granted to the annoyance of an ancient market of another. Dy. 276. b.

So, if a tenure be found of the king by office, upon which the king grants the ward, after traverse of the office, A., who was really the lord, may have a *scire facias* against the grantee. 2 Rol. 191. l. 45.

(F 5.) When a *scire facias* is not necessary.

But if there be only one patent, the patentee shall not be ousted by the king for a cause of forfeiture, without a *scire facias* against him at the suit of the king. Dy. 198. a. R. Dy. 211. a. 2 Rol. 192. l. 2.

Except where the cause of forfeiture appears by office, or other record: for then the king may oust the patentee without a *scire facias*. R. 9 Co. 95, 96. 2 Rol. 191. l. 10.

If the king grants by patent to A., and afterwards by a second patent grants another thing to B., who by colour of it ousts A., where in truth A. had not a grant for the same thing; he shall not have a *scire facias*, but an assise. 2 Rol. 192. l. 12.

If the king grants the same thing to divers, by two several patents, the second patentee cannot have a *scire facias* against the first. 2 Rol. 191. l. 52. Vide ante, (F 4.)

(F 6.) *Scire facias* for repealing a patent: — In what court it lies.

A *scire facias* for repealing a patent may be sued in chancery. 4 Inst. 79. 88. Dy. 197. b. 3 Lev. 220. Vide Chancery, (C 1.) Vide ante, (F 1., &c.)

[If *scire facias* out of the petty bag is returnable 'coram nobis in cancellaria nostra in octab. &c. ubicunque tunc fuerit, it is good without being limited *ubicunque in Anglia*. Str. 146.]

So, a *scire facias* for repealing a patent of the king, may be brought in B. R. 4 Inst. 72.

If it be returnable there, only B. R. hath jurisdiction to examine the irregularity of the issuing, return, &c. Mod. Ca. 229.

It may be sued by the king, or by him who has a prejudice by the patent. R. Mod. Ca. 229.

(F 7.) In what manner used.

A *scire facias* ought to be founded upon some record; and therefore, a *scire facias* to repeal a patent ought to be in chancery, where the patent is upon record; or in a court where a forfeiture, or other cause of repeal appears by office, or other matter upon record in the same court. R. 3 Lev. 223. Semb. Mod. Ca. 229.

But the patent itself is a sufficient record, upon which a *scire facias* may be founded for repealing the patent. R. 3 Lev. 223.

So, an inquisition, which finds a patent, and a cause of forfeiture, is a sufficient ground for a *scire facias*. Vide Officer, (K 11., &c.)

So, an information, or an indictment, for an offence which is a cause of forfeiture, and a conviction in it.

A *scire facias* is sufficient, if it alleges a matter by *datum est nobis intelligi quod*, &c.; for that is sufficient to put the party to an answer. R. 3 Lev. 222.

So, if a *scire facias* be by the king for repealing a patent upon a forfeiture of an office, the cause of forfeiture ought to be mentioned in the writ. Dy. 198. b.

But if a *scire facias* be by a former patentee, the writ need not mention any cause of forfeiture. Dy. 198. b.

(F 8.) Plea to a *scire facias*, and judgment upon confession, or by default.

If the defendant in a *scire facias* can say nothing for maintaining the patent, judgment may be for annulling the patent upon his confession. Dy. 197. b.

So, judgment shall be in the same manner, if the defendant, being returned warned, makes default. Dy. 197. b. 2 Rol. 192. l. 20. 25.

Or, if the default be upon two *nihil*s returned. Dy. 198. a.

So,

So, the defendant may demur upon a *scire facias*, if the matter alleged be not sufficient for a repeal of the patent. 3 Lev. 221.

[That the grant (without mentioning the user) is to the prejudice of &c. is a good issue. H. 3. G. Str. 43.]

The judgment in a *scire facias* for repealing a patent shall be, *quod literæ patentēs domini regis revocentur, cancellentur, evacuentur, et annullentur, et vacuæ, invalidæ, et pro nulla penitus habeantur, ac quod irrotulamentum eorum cancelletur, cassetur, et adnihiletur.* 4 Inst. 88. Dy. 197. b.

### (G) Surrender of a patent.

So, if a man surrender his patent, and it be cancelled, and a note of it indorsed, and afterwards the surrender inrolled, it shall be vacated by it. Dy. 167. a.

And after the *vacatur* entered upon the roll, a *constat* of it shall not be granted. Dy. 167. a. in marg.

If a patent be to two, and the chancellor makes a duplicate, and delivers the original to one, and the duplicate to the other, a surrender of the original patent is sufficient, though the duplicate be not surrendered or cancelled; for the duplicate was made by the chancellor, without a warrant. R. Dy. 179. b.

But a surrender, and cancelling with an indorsement of it, is not sufficient, if the surrender be not inrolled. Dy. 167. a. 195. a.

Nor, a surrender to a master in chancery out of court, which was accepted by him, and inrolled, without delivery of the patent to be cancelled. Semb. Dy. 176. Vide Officer, (K 9.)

Vide ante, (E).

### (H) How a patent shall be pleaded.

If a man pleads a grant by letters patent, he ought to shew under what seal. Per Hale, 1 Vent. 222.

[When the defendant pleaded letters patent to a *quo warranto* information, and made a profert of them, the court refused *oyer* in another term than that in which the profert was made. 1 T. R. 149.]

Vide Pleader, (C 62, &c.)

### Right patent.

Vide DROIT, (B 1, &c. — D).

Vide more relating to PATENT, in DIGNITY, (C 4.) — DISMES, (C 5. — E 7.) — GRANT, (G 1, &c.) — PARLIAMENT, (L 36.) — VISCOUNT, (G 5.)

### PATRON.

Vide ADVOWSON. — ECCLESIASTICAL PERSONS, (C 10, 11.) — EGLISE, (H 2. 5.) — VISITOR, (A 4.)

### PAUPER.

#### Suit in forma pauperis.

Vide FORMA PAUPERIS.

**Poor.**

Vide JUSTICES OF PEACE, (B 64, &c.)

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**PAWN.**

Vide MORTGAGE.

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**PAWNAGE, OR PANNAGE.**

Vide CHASE, (O 2.) — GRANT, (E 8.)

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**PAYMENT.**

Vide CHANCERY, (4 F). — MERCHANT, (F 1, &c.) — PLEADER,  
(2 G 10. — 2 W 29.)

**Payment of debts.**

Vide ADMINISTRATION, (C 1, 2.) — CHANCERY, (3 A 3, &c. —  
3 P 1, &c. — 4 H 1. — 4 W 14.)

**Payment of legacies.**

Vide ADMINISTRATION, (C 3, &c.) — CHANCERY, (3 A 3, &c. —  
3 G 2, &c. — 3 Y 3. 6.)

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**PEACE.**

Vide LEET, (M 9.) — PRÆROGATIVE, (D 1, &c.)

**Justices of peace.**

Vide Title JUSTICES OF PEACE. — DISMES, (M 4.) — FORCIBLE ENTRY,  
(A 1. — D 1, &c. 12, &c.) — LONDON, (K 6.)

**Clerk of the peace.**

Vide JUSTICES OF PEACE, (D 5.)

**Contra pacem.**

Vide ACTION UPON THE CASE, (C 4.) — PLEADER, (3 M 8.) — PROHI-  
BITION, (F 7.)

**Surety of the peace.**

Vide FORCIBLE ENTRY, (D 16, &c.) — JUSTICES OF PEACE, (B 5, 6, 7.)

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**PECULIAR.**

Vide ADMINISTRATION, (B 6.) — ADMINISTRATOR, (B 3. 5.)

## PEER AND PEERAGE.

Vide ABATEMENT, (D 4.)—CHANCERY, (D 2.)—DIGNITY, PER TOTUM.—ECCLESIASTICAL PERSONS, (C 1.)—NOBILITY.—OFFICER, (E 5.)—PARLIAMENT, (L 16, &c.)—SCOTLAND, (D 4. 6.)—SEREMENT, (C).

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## PENAL STATUTE.

Vide ACTION UPON STATUTE, PER TOTUM.—FORFEITURE (C).—PARLIAMENT, (R 19, 20.)

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## PENALTY.

Vide ALLEGIANCE, (B 4.)—CHANCERY, (3 S 2.—4 D 16. 19.)—FORFEITURE.—HERESY, (B 6.)—PENAL STATUTE.—PRÆROGATIVE, (D 60.)

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## PENSIONS.

Vide PROHIBITION, (G 11.)—TENTHS, (D).

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## PERAMBULATION OF A FOREST.

Vide CHASE, (G 1.—I 1, 2.)

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## PERAMBULATIONE FACIENDA.

Vide PLEADER, (3 G.)

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## PERFORMANCE.

Vide CHANCERY, (2 C 1, &c.—2 X 1, 2.—4 D 4. 14.)—CONDITION, (G 1, &c.—K 1.—L 1, &c.—M 2, &c.)—COVENANT, (E 2.)—ESTATES, (A 7, 8.)—PLEADER, (C 51, &c.—2 G 15.—2 V 13.—2 W 33.)

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## PERJURY.

Vide ACTION UPON THE CASE, (B 7, 8.)—JUSTICES OF PEACE, (B 102, &c.)

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## PERPETUITY.

Vide CHANCERY, (4 G 1, &c.)

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## PERSONATING.

Vide ACTION UPON THE CASE FOR A DECEIT, (A 3.)

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## [PETER-HOUSE COLLEGE.]

[Under the statute *de electione magistris* of Peter-house College, Cambridge, the Bishop of Ely has only a discretion which of the two candidates

A a 2

dates presented to him by the fellows he will prefer. He cannot enquire into their fitness; a question to be decided by the fellows alone; in selecting one, therefore, he does not act in his capacity of visitor, but under a definite power, delegated by the statute. 2 T. R. 290.]

[The meaning of the statute *de præfectione et qualitate magistri* of Peter-house College, Cambridge, is, that in the election of a master, regard shall always be had to the scholars, so that if there be any among them who are qualified, they shall be preferred to all others; but if there be none such among the scholars, then the two to be returned to the bishop shall be taken from among other persons indifferently. 2 T. R. 290.]

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### PETITION.

Vide PARLIAMENT, (F 1, &c. — L 2. 14, 15.) — PRÆROGATIVE, (D 78, &c.)

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### PETIT CAPE.

Vide PROCESS, (D 5.)

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### PETIT CONSTABLE.

Vide LEET, (M 6.)

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### PETIT LARCENY.

Vide JUSTICES, (O 4.)

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### PETIT TREASON.

Vide FORFEITURE, (B 3. 5.) — JUSTICES, (L 1, &c. — Y 4.)

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### PHEASANTS.

Vide JUSTICES OF PEACE, (B 46.)

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### PHYSICIANS.

- (A) Physicians; the college of physicians. p. 356.
- (B) Privilege of a physician. p. 358.
- (C) Apothecary. p. 359.
- (D) Surgeon. p. 359.

(A) Physicians; the college of physicians.

All medicines are administered by physicians, apothecaries, or surgeons.

By

By charter 23 Sept. 10 H. 8. the king incorporated the physicians in London, *per nomen præidentis et collegii, sive communitatis facultatis medicinæ London.* 8 Co. 108. 114.

And granted by the same charter, that within seven miles of London, or within London, none shall practise physic, if he be not allowed by the president and college *sub pœnâ 5l. per mensem*, a moiety to the king, a moiety to the college. 8 Co. 114.

And that there be four censors annually chosen by the college, *qui haberent scrutinium, correctionem, et gubernationem omnium medicorum facultatem illam uten. in London, aut suburbia, aut 7 milliar. in circuitu ejusdem civitat., et omnium medicinarum, &c.* (Vide 8 Co. 114. b.)

By the st. 14 H. 8. 5. this corporation, and every clause in the same charter, are confirmed.

And afterwards, by the st. 1 Mar. 9.

So, by the same st. 1 Mar. 9. it is enacted, that if the said president and college, or such as they yearly authorise to search, examine, correct, &c. commit any offender for his offence, to any prison in London, the gaoler, &c. shall keep him without bail, till discharged by the president, or those authorised, &c. on pain of double the fine or americiament assessed on the offender; so as such fine, &c. exceed not 20*l.* at any one time: a moiety to the king, a moiety to the college.

So, by the st. 14 H. 8. 5. no person shall practise physic through England, till examined at London by the president and three elects, and having letters testimonial from them; except he be a graduate of Oxford or Cambridge, &c.

And therefore if any (not a graduate of one of the universities) practise physic in London, or within seven miles, without licence of the college of physicians, he shall be subject to 5*l.* per month penalty. R. 2 Bul. 185.

Though he be a man of skill: for the st. 14 H. 8. 5. extends to all physicians. Pal. 486.

So, if he practise in another part of the kingdom, without their licence.

Though the king, by patent, grants him a licence to practise. R. 4 Mod. 47.

And this penalty of 5*l.* per month every one will be subject to pay, though he does not use male practice. 8 Co. 117. b.

And an information lies for the penalty. Ibid.

Or, an action of debt by the president and college, *qui tam*, &c. 2 Cro. 121. Cro. Car. 256.

And, if the president diës after judgment, and before execution, his successor, and not his executor, shall have execution. 1 Brownl. 93. 2 Cro. 159.

But an action does not lie by the president alone. R. 2 Bul. 185.

So, for male-practice of physic, the censors may punish any one by fine, americiament, imprisonment, &c. *secundum quantitatem delicti.* 8 Co. 117. b.

Though he did not use male-practice for the space of a month. 8 Co. 117. b. 120. b.

And they may, for cause allowed by the charter and statute, impose a treasonable fine, and make a record of it, and for non-payment immediately imprison him. 8 Co. 120, 121.



And therefore they have a judicial power in cases within their conuissance. R. 1 Sal. 396. Carth. 494.

And they are a court of record: for otherwise they could not fine and imprison. Ibid.

And therefore, if they make a judgment of a thing within their conuissance, it cannot be traversed; as, if they determine any medicines to be hurtful and unwholesome. Ibid.

But, by the st. 14 H. 8. 5. none shall practise physic through England, except a graduate of Oxford or Cambridge, who hath accomplished, &c. his form, without any grace.

And therefore, a graduate in a university may practise physic, without licence of the college, in any part of the realm, out of London, or the suburbs. 2 Brownl. 261.

So, he may in London, or the suburbs; for he is not within the enacting part of the statute, or at least he is excepted by the exception, Per Daniel J. Warburton cont. 8 Co. 116. b.

So, any may practise in London, without a licence, if he does not use it for a month. 8 Co. 117. b. 120. b. 2 Brownl. 264.

And if he uses it for a month, he can have no other punishment than 5*l.* per month. 8 Co. 120. b.

So, an apothecary may send physic to a patient, for a distemper which he knows, without direction by a doctor, though he has not a licence. R. cont. B. R. But this was reversed in parl. Mod. Ca. 44.

So, the censors have no power, by charter or statute, to punish any by fine or imprisonment for practising physic without licence; for their power of punishment extends only to male-practice. R. 8 Co. 117. 120. 2 Brownl. 264.

So, they cannot impose a fine, but for a certain cause. 8 Co. 121. a. Skin. 676.

Neither can they impose a fine for themselves; for the fine belongs to the king. R. 8 Co. 119. b. 121. a.

Neither ought it to be imposed by the president and censors, but by the censors only. 8 Co. 119. b.

Neither ought it to be imposed, without making a record of it. 8 Co. 120.

And if there be imprisonment for non-payment, it ought to be inflicted immediately. 8 Co. 119. b. 120. a.

So, a remedy for a fine, or penalty, ought not to be by plaint before themselves; but by action, &c. at the common law. 2 Brownl. 265.

So, none shall be fined, and also imprisoned for the same offence. Ibid.

[Candidates to be admitted of the college are to be examined by the *com. min.* then proposed to the *com. maj.* and elected by them, before they can claim to be admitted. 4 Burr. 2186.]

[A doctor of medicine, licensed by the college of physicians to practise in London and seven miles round, cannot compel the college to examine him that he may be admitted a fellow. 7 T. R. 282.]

### (B) Privilege of a physician.

So, by the st. 32 H. 8. 40. the president or fellows of the college of physicians shall not exercise the office of constable, or other office in, London,

London, or the suburbs, nor keep watch or ward; but if chosen to the office, &c. his election shall be void.

[The fees of a physician are honorary, and not demandable of right; and a physician cannot maintain an action for them. 4 T. R. 317.]

### (C) Apothecary.

By the st. 32 H. 8. 40. mention is made of the wardens of the mystery of apothecaries in London.

And, by the same statute, the president of the college of physicians may yearly appoint four most discreet of that faculty, who being sworn by the president, may, as oft as they see fit, enter the houses of apothecaries in London, to search wares, &c. And such as they find corrupt or unmeet for medicines, to destroy; and an apothecary refusing entrance for such purpose, forfeits 5*l.* for each offence. And a person elected, refusing to be sworn, or make search, &c. 40*s.*

[The house-apothecary of an infirmary is a person coming within the exception in the statute q. v. 7 Taunt. 401. 1 Moore, 102.]

### (D) Surgeon.

By the st. 3 H. 8. 11. no person in London, or seven miles, shall practise physic or surgery, unless examined and allowed by the bishop of London, or dean of St. Paul's, with four doctors of physic, and for surgery, others expert, (four at least so approved,) on pain of 5*l.* per month, &c.

And this statute continues as to surgeons, though as to physicians it is varied by the st. 14 H. 8. 5. and 1 Mar. 9.

But, by the st. 3 H. 8. 11. a graduate of either university is excepted.

So, by the st. 32 H. 8. 40. since the science of physic comprehends the knowledge of surgery, the president and fellowship of physicians, or the fellows admitted by them, may practise physic in all its parts.

[By st. 32 H. 8. c. 42. the surgeons of London are incorporated with the barbers of London; but they are separated from them by st. 18 G. 2. c. 15.]

[But the latter act only dissolves the union. The two separated companies remain under the same regulations as before. 4 Bur. 2133.]

So, by the st. 34 H. 8. 8. any subject, who hath the science or experience of herbs, roots, or water, by speculation or practice, may minister, &c. to any outward sore, swelling, disease, &c. in London, or elsewhere, any herbs, ointment, baths, plaisters, &c. according to their cunning, or drinks for the stone, stranguary, or agues, without penalty, &c.

And this liberty for application in surgery to external sores, &c. or for potions in three particulars, continues not repealed by the st. 1 Mar. 9. which regards physicians. Per Cro. Richardson cont. Cro. Car. 257. Lit. 169. 212. 351. Jon. 261. R. cont. 2 Cro. 121.

Yet the st. 34 H. 8. 8. enables only to make application to external sores, &c. not to internal.

So, it extends only to good women in the country, &c. who act for charity; not to those who administer for profit. R. Lit. 351.

## PILOT.

## PICAGE.

Vide MARKET, (F 2.)

## PIE-POWDER.

Vide MARKET, (G 1, 2.)

## PILLORY.

Vide LEET (K). — TUMBREL (B.)

## [PILOT.]

[The st. 5 G. 2. c. 20. which inflicts a penalty on any one piloting a vessel down the Thames, &c., other than a person authorised by the Trinity-house, only relates to ships going down the Thames, in the course of their navigation on foreign voyages. 5 T. R. 76.]

[A regular pilot is only requisite, under st. 5 G. 2. c. 29. when the vessel is going up or down the Thames, in the course of her voyage. 8 T. R. 241.]

[Coasting vessels are not within the 52 G. 3. c. 39. (q. v.) or compellable to take a pilot on board, on entering rivers within the limits of the jurisdiction having authority to appoint and license pilots; and the exemption in the act is not confined to coasters using the navigation of the river Thames alone. 2 Price, 118.]

[The relation of master and servant does not subsist between the owner of a ship and a pilot taken on board under the general pilot act, since the owner was compelled to receive him. Hence, the owner cannot be a sufferer with respect to the underwriter or otherwise for his misconduct. 4 M. & S. 77.]

[The master is answerable for the negligence of his crew, though committed under the directions of a pilot, who for the time supercedes him in the government of the ship. 1 Taunt. 568.]

[An action cannot be maintained against the master of a vessel for running down a ship, while, in pursuance of the pilot act, he has a pilot on board, no positive default in the master being proved. 7 Taunt. 258. 1 Moore, 4.]

[The 30 sect. of the 52 G. 3. c. 39., (commonly but improperly called the general pilot act,) discharging masters and owners of vessels having pilots on board, from responsibility for damages occasioned by the neglect of the pilot, held, not to apply to vessels having on board pilots appointed for other places than those expressly named in the preamble or provision of the act. 3 Price, 302.]

[The clause in the pilot act exempting masters from liability for damage occasioned by the pilot's misconduct, is not confined to damage to the piloted ship and cargo. 7 Taunt. 309.]

[The ship-owner, taking in a pilot pursuant to the Liverpool local pilot act, is liable for injuries occasioned by his negligence. 3 Price, 302.]

[The

[The owners of a merchant-vessel running foul of and damaging a king's ship lying in the Mersey by misconduct of the persons on board, are liable in an information for damages in the nature of an action on the case; although she had on board at the time of the accident a pilot duly licensed; because the Liverpool local pilot act is not of itself, or by reference to the 52 G. 3. c. 39. imperative, compulsory, or penal, in the captain, to take a pilot on board whilst lying at anchor, but merely subjects him to the payment of the pilot's regulated allowance on refusal. 3 Price, 302.]

[The provisions of the general pilot act extend to pilots appointed for limited districts; thus, to those appointed under the Liverpool pilot act. 4 M. & S. 77.]

[Every person who takes upon himself to pilot ships before being examined, approved, and admitted into the fellowship of the pilots of the Trinity-house, incurs the penalties of 3 G. 1. c. 13. 2 Blk. 690. 5 Burr. 2602.]

[A master or owner not being a regular pilot, may not pilot his own vessel up the Thames. 2 Blk. 690. 5 Burr. 2602.]

[Semble, a forfeiture under the 52 G. 3. c. 39. s. 34. for refusing to receive a pilot on board, is not incurred, unless the pilot produces his license on demanding admission. 2 Price, 118.]

[The penalties imposed by st. 52 G. 3. c. 39. s. 11. on ships neglecting to take in a pilot on arriving off Dungeness, are to be calculated on ships bound for the river, not on the pilotage due from Dungeness to the Downs, but on that which would be due on the ship's arrival at her ultimate place of destination in the river. 1 Mars. 585. 6 Taunt. 256.]

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## PIOUS USES.

Vide *USES*, (M—N 1, &c.)

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## PIPE.

Vide *COURTS*, (D 9. 13.)

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## PIRACY.

Vide, *ADMIRALTY*, (E 3.)

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## PISCARY.

(A) *The nature of the privilege.* p. 361.

(B) *Ferry.* p. 363.

(A) *The nature of the privilege.*

[The right of fishing in the sea is a right common to all the king's subjects; and, therefore, a prescription for such a right, as annexed to certain tenements, is bad. C. P. T. 14 & 15 Geo. 2. Willes, 265.]

A pis-

A piscary is the liberty of fishing in the water of another. Nom. verb. Piscary.

And this liberty may be claimed by grant or prescription. Vide Prærogative, (D 50.)

By a grant of a piscary, the liberty only passes, and not the soil. Co. L. 4. b. Cont. Dav. 55. b.

And a grant may be made *de liberâ, vel de separali piscariâ*.

If a grant be *de separali piscariâ*, the grantee ought to have the soil; for in trespass for fishing in *separali piscariâ, liberum tenementum* of another, is a good plea. Sal. 637.

If a grant be *de liberâ piscariâ*, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there. Semb. Sal. 637. 4 Mod. 186, 187. Skin. 342.

And it may be a free fishery in his own soil. Skin. 678.

So, by a grant of the water, the fishery passes, but not the soil. Co. L. 4. b. Dav. 55. b.

So, the water may belong to one; all the profits in it, and the soil, and ferry to another. Sav. 14.

Yet, a man may have an estate of freehold or inheritance in a fishery. Dav. 55. b.

And may make livery upon a grant of a several fishery. Co. L. 4. b.

So, an assise lies of a several fishery. Dav. 55. b.

So, it may be demanded by a *præcipe*. Ibid.

So, a *quod permittat* lies of a fishery. Ibid.

And a *monstraverunt*. Ibid.

So, a writ *de rationalibus divisis*. Dav. 57. b.

[By st. 5 G. 3. c. 14. s. 3. persons taking, killing, or destroying any fish, in any river or stream, pond, pool, or other water, (not being in any park or paddock, &c.) shall forfeit for every offence the sum of 5*l.* to the owner, &c. to be recovered before a justice of peace.]

[Or, by s. 4. the owner may recover the penalty by action, brought within six calendar months next after the offence committed.]

[But by s. 5. none are subject to the penalties of this act who have a just right or claim to take, kill, or carry away any such fish.]

[By virtue of the latter clause, a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to the penalty under this statute. Doug. 517.]

If a man justifies for using a piscary, he ought to shew whether it be a common, free, or several piscary. R. Hard. 407.

So, whether it be appurtenant to a manor or messuage, &c. for it is an interest, and not an easement. Hard. 407. Vide supra Biens, Navigation.

[The owner of a fishery in a public river cannot carry weir entirely across it. 3 Smith, 244. 7 East, 195.]

[An exclusive privilege in fishing in a navigable river, or an arm of the sea, may be claimed by prescription, and for a disturbance of such right trespass will lie. 4 Burr. 2162.]

[There may be a prescriptive right in a subject to a several fishery in an arm of the sea. 4 T. R. 437.]

[A grant of a several fishery may be subject to particular reservations or exceptions. 5 Burr. 2814.]

[Trespass

[Trespass lies for entering a several fishery. And it may be recovered in ejectment. 1 T. R. 361.]

[Presumptions are, that he who has a separate fishery is owner of the soil. Andr. Loft. 364.]

[*Infra*, (A) Prærogative, (D).]

## (B) Ferry.

So, a ferry does not belong to him who has the water, or a fishery in it. Sav. 11.

A ferry is a franchise, which cannot be set up without the king's licence. Hard. 163.

If it be erected by licence, another cannot erect a ferry to the nuisance of it. Vide Action upon the Case for a Nuisance, (A).

Though it be upon his own soil. Cont. Hard. 163. But the reporter makes a *qu.*

But he who has the privilege of a ferry, ought to have a right to the soil upon both sides of the water; for he cannot land upon the soil of another, without his assent. Sav. 11.

A ferryman ought to be privileged, that he be not taken for a soldier. Ibid.

A common ferryman may be indicted, if he does not keep his ferry in good repair. Hard. 163.

So, an action upon the case lies against him, if he refuses passengers, or takes excessive prices. Hard 163. Adm. Carth. 191. 194.

And it is sufficient to say, that all the inhabitants of the town have used *transire ad libitum*. R. Carth. 191.

And it is no excuse, that he built and repaired a bridge for passage. R. Carth. 193.

But an action upon the case does not lie, for not keeping his ferry, without special damage, any more than for a common nuisance. R. Carth. 194.

[A boat may lawfully ply with passengers from one of the *termini* of a ferry to a place without, however near to the other, if done *bona fide*, and not to injure the ferryman's right. 4 T. R. 666.]

[If there be an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C., though it be near B., provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. B. R. E. 32 G. 3. 4 T. R. 666.]

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## PLACE.

Vide PLEADER, (S 9, &c.) — PRIVILEGE, (A 2.)

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## PLAINT.

Vide ABRIDGMENT. — ASSISE, (B 11.) — COUNTY, (C 8. 12.) — COURTS, (P 7.) — PLEADER, (C 9. — 3 K 2.)

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## PLANTATIONS.

Vide NAVIGATION, (G 1, &c.)

PLAY.

## PLAY.

Vide ACTION UPON THE CASE FOR A DECEIPT, (A 1.) — BANKRUPT, (D 38.)  
— JUSTICES OF PEACE, (B 42.) — PLEADER, (2 G 8.) — 2 W. 26.)

## PLEA.

Vide ABATEMENT, *per totum*. — ACCOMPT, (E 3, &c.) — ACCORD. — ACTION UPON THE CASE UPON ASSUMPSIT, (H 5, 6. 8.) — ACTION UPON THE CASE FOR A DECEIPT, (F 4.) — FOR A DISTURBANCE, (B 2.) — FOR NEGLIGENCE, (C 3.) — FOR A NUISANCE, (E 2.) — ACTION UPON THE CASE UPON TROVER, (G 6.) — ADMIRALTY, (E 21.) — AMENDMENT, (K 1. — M.) — ANCIENT DEMESNE, (F 5, 6. — G 2, 3. 5.) — ANNUITY, (F.) — APPEAL, (G 3. 7, &c.) ARBITRAMENT, (I 4.) — ASSISE, (B 12, &c. — C 3, 4.) — ATTACHMENT, (H — I.) — ATTAINT, (C 4.) — ATTORNMENT, (M.) — ATTORNEY, (B 22.) — BAIL, (R 3, &c.) — BANKRUPT, (D 35. 39.) — BARGAIN AND SALE, (B 12.) — BARON AND FEME, (2 D.) — BASTARD, (D 1.) — CHANCERY, (I 1, 2.) — CHARTERS, (B 3.) — COPYHOLD, (P 4. — Q 7.) — COURTS, (P 10.) — DEVISE, (P.) — DISMES, (M 15.) — DROIT, (C 5.) — ERROR, (D.) — FINE, (H 1, 2.) — INDICTMENT, (K — L.) — INFORMATION, (D 5.) — JUSTICES, (W 3.) — PARLIAMENT, (L 4.) — PATENT, (F 8. — H.) — PLEADER, (E 1, &c. — M 2. — O 2. — Q 6. — Y 3. — 2 A 3. — 2 D 3, &c. 12, &c. — 2 E 3. — 2 G 1, &c. — 2 L 2, 3. — 2 S 11. 17. — 2 V 4, &c. — 2 W 13. 16, &c. — 2 X 3, &c. — 2 Y 4, &c. — 2 Z 3. — 3 A 8. — 3 B 18, 19. — 3 E 4. — 3 F 3. — 3 I 7, &c. — 3 K 11, 12. — 3 L 10, &c. — 3 M 11, &c. — 3 N 4. — 3 O 7, &c. — (POIAR, (F.) — PRÆROGATIVE, (D 74.) — PRÆSCRIPTION, (H.) — QUO WARRANTO, (C 4.) — RECEIPT, (B 3.) — SURRENDER, (N.) — TEMPS, (G 19.) — VOUCHER, (B 1, 2. — F 1, 2.) — UTLAGARY, (C 2.)

## Common pleas.

Vide COURTS, (C 1, &c.) — PLEADER, (C 4. 11, &c. — 3 B 2.) QUOD PERMITTAT, (D 2.)

## CONUSANCE OF PLEAS.

Vide COURTS, (P 1, &c.)

## COURT OF PLEAS.

Vide CHANCERY, (A 1.) — COURTS, (D 2.) — DEBT, (G 14.)

**A DIGEST**  
**OF**  
**THE CASES AT NISI PRIUS.**





# A DIGEST

OF

## THE CASES AT NISI PRIUS.

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### ACTION.

#### I. *Its nature defined.*

THAT which is instituted in the form of a legal proceeding to recover a right, is a suit ; such as an arbitration. *Parker and another v. Harcourt*, 5 Esp. C. 251. Arbitration.

#### II. *In what cases an action is maintainable.*

1. An action on the case may be maintained against a judge of the ecclesiastical court, who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. *Beaurain v. Sir W. Scott*, 3 Campbell, 388. Judge.

2. A company, such as the Gas Light Company, which has been entrusted by the legislature with the execution of a power from which mischief may result to the public, is bound to take especial precaution to guard against such mischief, and in default is responsible in damages. *Weld v. the Gas Light Company*, 1 Starkie, 189. Public company.

3. The owners of a post office packet are liable for stores ordered by the Captain, who is appointed by the postmaster-general. *Stokes v. Carne*, 2 Camp. 339. Government agent.

4. An action lies where injury results from the non performance of a gratuitous undertaking, and where the plaintiff, had no promise been given, might otherwise have secured himself. *Wilkinson v. Coverdale*, 1 Esp. N. P. C. 75. ; *Wallace v. Telfair*, 76. Volunteer.

5. Where the public claim way over premises, and the owner without admitting the right, allows them to use it, he is answerable for the consequences of permitting a dangerous animal to go at large therein. *Brook v. Copeland*, 1 Esp. N. P. C. 203.

6. One who employs a tradesman to execute a work, is liable for injuries resulting from his negligence. *Sly v. Edgley*, 6 Esp. C. 6. Misconduct of others.

7. A stable keeper who lets out horses to draw a private carriage, and which are rode by his own drivers, is answerable for their negligence. *Sammell v. Wright*, 5 Esp. C. 263.

8. Where two hire a chaise jointly and one drives, the other is answerable for his unskilfulness. *Davey v. Chamberlain and another*, 4 Esp. C. 229.

9. A schoolmaster who permits an infant pupil under his care to make use of fire works, is responsible in an action for the mischief which ensues. *King v. Ford*, 1 Starkie, 421.

10. A person before he entrusts a gun to an incautious agent is bound to render it perfectly innoxious. *Dixon v. Bell*, 1 Starkie, 287.

Resulting damage.

11. An action lies against the master of a vessel, for purposely firing a cannon at negroes, and thereby preventing them from trading with the plaintiff. And it is no answer to such action that the plaintiff had not conformed to the law of the country, in paying the duty due to the king for his licence to trade. *Tarleton v. McGawley, Peake*, 205.

12. It is actionable to discharge a gun so near an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy. *Carrington v. Taylor*, 2 Camp. 258.

13. In an action for false imprisonment on board a ship, the plaintiff cannot recover as special damage, the expence he incurred in leaving the ship, and taking his passage on board another, unless the injury continued to the moment of his transhipment. *Boyce v. Bayliffe*, 1 Camp. 58.

Cross action.

14. It is no answer to an action on an attorney's bill, for prosecuting a suit for the defendant, that no benefit has been derived by the defendant, where the failure does not result wholly from the plaintiff's negligence, but partly from accident. *Dax v. Ward*, 1 Starkie, 409.

Double action.

15. Where a plaintiff includes two demands in his declaration, but through mistake goes into evidence, and takes judgment as to one only, he may afterwards sue for the other, though judgment went by default to the whole declaration, and though the defendant was arrested for both demands. *Seddon v. Tutop*, 1 Esp. C. 401.

Though remediable by motion.

16. An action for money had and received at the suit of a plaintiff, who has sued out, a *fi. fa.* lies against the sheriff who executed it, if he retain more money in his hands than he is entitled to do; the party injured not being bound to proceed by motion in bank. *Longdill v. Jones*, 1 Starkie, 345.

### III. *In what cases an action is not maintainable.*

Corporator.

1. An action does not lie against individuals for acts erroneously done by them in a corporate capacity; at least not without proof of malice. *Harman v. Tappenden and others*, 3 Esp. C. 278; *S. C.* 1 East, 555.

Volunteer.

2. The owner of premises may guard them at night by letting loose a savage dog, and is not answerable if it bites one who incautiously enters the premises. *Brock v. Copeland*, 1 Esp. N. P. C. 203.

3. In an action against the defendant for the negligence of his agent, in pulling down the party-wall between the houses of the plaintiff and defendant, it is a good defence to show that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. *Hill v. Warren*, 2 Starkie, 377.

4. A vessel of a particular construction took fire whilst *A.* the superintendant was on board; *B.* the owner, took a boat belonging to *A.* to reach the vessel and endeavour to extinguish the flames; in so doing the boat sunk; held that *B.* was not liable in money or trespass for the loss. *Drake v. Shuter*, 4 Esp. C. 165.

5. If a surgeon leaves a blank in his bill for the charge of attendances, he puts his demand on the footing of an honorary claim, and must

must be satisfied with what the patient gives him. *Tusor v. Batting*, 3 Esp. C. 192.

6. The owner of a barge upon the *Thames* lends it to another, who navigates it with his own men, who are guilty of negligence, in consequence of which mischief is done, (*semble*) the owner is not liable. *Scott v. Scott* and others, 2 Starkie, 438. Misconduct of others.

7. The proprietor of a theatre cannot sue one for libelling a performer, and thereby preventing her, from an apprehension of being hissed, undertaking her part, since the cause and consequence are too remotely connected. *Ashley v. Harrison*, 1 Esp. N. P. C. 48. *Peake*, 194.

8. A coal merchant being obliged to carry his coals round about from the highway, his regular track having been obstructed by an individual, is not special damage sufficient to maintain an action. *Hubert v. Groves*, 1 Esp. N. P. C. 148.

9. *A.* having deposited with *B.* 100*l.* to distribute amongst *A.*'s creditors in proportion to their claims, no one of these can maintain an action against *B.*, before the proportions of all the claimants have been ascertained. *Robson v. Andrade*, 1 Starkie, 372. Uncertainty.

10. *Quære*, If to trespass for destroying a picture, the defendant may plead, that it was a scandalous libel upon individuals, and that being publicly exhibited, he cut it to pieces by way of abating a nuisance? *Du Bost v. Beresford*, 2 Camp. 511. Illegality.

11. *Quære*, Whether action will lie for destroying a libellous picture? *Du Bost v. Beresford*, 2 Camp. 511.

12. One who professes to cure disorders within a specific time by means of sovereign medicines, and induces another to employ him by false and fraudulent professions of his skill, cannot recover for medicines or attendance. *Hupe v. Phelps*, 2 Starkie, 480. Fraud.

13. A party cannot make that the subject of a cross action, which would have been a defence to a former action against him; thus *A.* cannot sue *B.* for unskilful workmanship, after permitting him to recover for it. *Sintzenick v. Lucas*, 1 Esp. N. P. C. 43. Cross action.

14. It is agreed between *A.* and *B.* that *A.* for certain commission shall ship a cargo of wheat, of a specific quality, at a foreign port for *B.* in England. The wheat shipped by *A.* being found upon its arrival to be of an inferior quality, *B.* brings an action against *A.* for a breach of the agreement, and recovers damages. Held, that *A.* cannot afterwards maintain an action against *B.* for the commission, as his claim for this might have been given in evidence in the former action, to reduce the damages. *Kist v. Atkinson*, 1 Camp. 63.

15. *Semble*, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross-action on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered. *Fisher v. Samuda*, 1 Camp. 190.

16. *Quære*, Whether where the plaintiff after a nonsuit takes out money paid into court, he is precluded bringing a second action. *Rogers v. McCarthy*, 3 Esp. C. 106. Double action.

17. An action on the case does not lie against a sheriff (who has not been ruled to return the writ,) for neglecting to have the money in court according to the exigency of a *fi. fa.* *Moreland v. Leigh* and another, 1 Starkie, 388. Remediable by motion.

18. Where a ship is seized by the commander of one of his majesty's vessels as prize, and is afterwards released without any suit Remediable in another court.

being instituted against her, if the plaintiff have any ground of complaint, his redress is in a court of Admiralty; and no action can be maintained at common law, either of trespass for seizing the ship, or of false imprisonment for confining the captain and mariners. *Faith v. Pearson*, 1 Holt, 113.

#### IV. *Preliminaries to an action.*

- Notice.** 1. A local act of parliament provides, that no action shall be commenced for any thing done *in pursuance* of the act, until after notice of action shall have been given. Held, this applies to a case where the defendant acted under colour of the act, although he exceeded the powers conferred by it. *Graves v. Arnold*, 3 Campbell, 242.
- Demand.** 2. Where a refusal is necessary to give a right of action, it must appear that the demand was made by one duly authorized. *Coore v. Callaway*, 1 Esp. N. P. C. 115.
- Miscellaneous.** 3. *A.* lends money to *B.* and receives a gun as a security for the payment, *A.* may recover the amount without first returning the gun. *Lawton v. Newland*, 2 Starkie, 72.

#### V. *Parties to an action.*

- Who are considered as.** 1. A release by a nominal plaintiff, who sues as trustee for the benefit of another, is a bar to the action. *Anon*, 2 Esp. C. 657.
- Their privileges.** 2. A party to a suit, a prisoner, is not entitled to be brought up to attend the trial. *Thelluson v. Coppinger*, 3 Esp. C. 283.
3. If a party coming to attend the trial of his cause is arrested, the judge at *Nisi Prius* will grant a *habeas corpus* to discharge him; and will put off the trial until he is released, — without payment of costs, if any collusion can be shown to exist between the opposite party and the creditor who arrested him; otherwise, only upon payment of costs. *Solomon v. Underhill*, 1 Camp. 229.
- Who shall be plaintiffs.** 4. A promise by a debtor to a third person to pay him the debt, in consideration of his advancing the amount to the creditor, entitles such person to sue. *Arden v. Rowney*, 5 Esp. C. 254.
5. *Windsor Herald* and *Bluemantle Poursuivant* at Arms may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order for it was given, although only one of them was applied to by the defendant. *Townsend v. Neale*, 2 Camp. 190.
6. In such an action the plaintiffs are bound to give general evidence of the pedigree being true, unless this has been dispensed with by the defendant. *Townsend v. Neale*, 2 Camp. 191.
- Who shall be defendants.** 7. In suits *ex contractu* against several defendants, though the cause arise *ex delicto*, the plaintiff must recover against all or none. *Jacques v. Whitcomb* and another, 1 Esp. C. 363.
8. Where a party of several persons dine together at a tavern, they are jointly liable for the whole expence, and not merely each for his own share. *Forster v. Taylor*, 3 Camp. 49.
9. Where goods are ordered by one member of a club for the benefit of all; every member who either concurs in the order, or subsequently assents to it, is liable, although the member who ordered the goods is made the debtor in the plaintiff's books, and the bill is sent to him, unless it clearly appear that the plaintiff meant to give credit to that member only. *Delauney v. Strickland*, 2 Stark. 416.
10. The goods of a stranger on the premises of another were distrained by the landlord for rent in arrear, and the stranger was obliged

obliged to pay the rent to redeem them; held that the stranger might maintain *assumpsit* for money paid to the use of the original lessees, who were bound for the rent by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Exall v. Partridge and others*, 3 Esp. C. 8 S. C. 8 T. R. 308.

11. Drawing up an inventory, a notice, and the like, though in relation to an unlawful affair, known to be such, will not make the agent answerable as a party concerned therein, since these acts produce no injury. *Ward v. Haydon and another*, 2 Esp. C. 553.

12. If *A.* states positively to the commander of a press-gang, that *B.* is liable to the impress-service, who in truth is not so, and *B.*, in consequence of this information, is impressed, *A.* is liable to an action of trespass and false imprisonment at the suit of *B.* *Flewster v. Royle*, 1 Camp. 187.

13. A plaintiff cannot recover in one action against several defendants damages for the individual trespass of each, and in which the others took no part. *Sedley v. Sutherland and others*, 3 Esp. C. 202.

14. If while *A.* is lawfully imprisoned by *B.*, *C.* commits an assault upon him, *C.* is guilty of the false imprisonment as well as *B.*; and if *A.* sues both separately, the pendency of one suit may be pleaded in abatement of the other. *Boyce v. Douglass*, 1 Camp. 60.

15. If several jointly engage a tradesman to execute a work, each may be sued separately for an injury resulting from the tradesman's negligence. *Sly v. Edgley*, 6 Esp. C. 6.

#### VI. Joinder in action.

It seems that in debt on a remedial statute for a penalty, counts *ex contractu* may be joined; at least for money had and received, extorted from the plaintiff. *Jacques v. Whitcomb and another*, 1 Esp. C. 363. *Ex contractu and ex delicto.*

#### VII. Abatement of action.

If a co-plaintiff die, the suit will be abated, unless the death be suggested according to the statute 8 and 9 W. 3. c. 11. s. 6. And therefore if a co-plaintiff die after issue joined, a trial without such suggestion upon the record would be extra-judicial; and consequently no perjury could be assigned upon any false evidence given at such trial. *Rex v. Cohen*, 1 Starkie, 511. By death.

#### VIII. Pleadings.—General matters.

1. The English courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country. *Ganer v. Lady Lanesborough, Peake*, 18. *Ex officio notice.*

2. A judge at *Nisi Prius* will not take judicial notice of the King's proclamations. *Van Ameran v. Dowick*, 2 Camp. 44.

3. Where the declaration is entitled generally of the term, evidence of a cause of action subsequent to the first day of term is inadmissible, unless on producing the writ it appears that the action was commenced on a subsequent day. *Rhodes v. Gibbs*, 5 Esp. C. 163. Title of declaration.

4. Where a declaration is entitled generally of the term, and the defendant means to give evidence of a tender between the first day of the term to which the declaration relates and the day of suing

out the writ, he must call upon the plaintiff to entitle his declaration properly, or he will be precluded. *Rolfe v. Norden*, 4 Esp. C. 72.

Plea puis dar-  
reign continu-  
ance.

5. After action brought, the defendant pays the plaintiff the debt and costs in the cause, and takes a receipt for the same. The plaintiff nevertheless proceeds in the action, and the defendant pleads the general issue. The receipt is no defence under this plea, and plaintiff is entitled to nominal damages. *Holland v. Jourdine*, 1 Holt, 6.

6. A plea *puis darreign* continuance will be received when tendered at *Nisi Prius*, if it bear the form and semblance of a plea; but in order to prevent vexatious delay, the court will order a demurrer to such a plea to stand for the first paper day in term. *Fitch v. Toulmin*, 1 Starkie, 62.

### IX. Pleadings. — Variance.

Abortion.

1. Upon an indictment on 43 Geo. 3. c. 58. s. 2., charging the prisoner with having administered to a woman the decoction of savin with intent to procure abortion, it is not a material variance that the preparation of savin administered is properly called an infusion, not a decoction. *Rex v. Phillips*, 3 Camp. 73.

Annuity.

2. An averment that a specific sum was taken for soliciting and procuring money to purchase an annuity, is sufficiently proved by evidence that part of the sum was taken as procuration money, part for deeds to secure the money borrowed. *Rex v. Gilham*, 1 Esp. C. 287.

Bankruptcy.

3. *Semble*, that an action for maliciously suing out a commission of bankrupt, it is a fatal variance to allege that the defendant sued the commission out of the "High Court of Chancery." *Poynton v. Forster*, 3 Camp. 58.

4. In such an action to sustain an allegation that the commission was duly superseded, it is not enough to prove an order by the Lord Chancellor, directing it to be superseded. *Poynton v. Forster*, 3 Camp. 60.

5. The non joinder of a joint assignee of a bankrupt, in an action of assumpsit brought by the assignees, is a ground of nonsuit upon the trial under a plea of the general issue. *Snelgrove v. Hunt*, 2 Starkie, 424.

6. The assignees under a joint commission against *A.* and *B.* may, in an action to recover a debt due to *A.* alone, describe themselves in the declaration as the assignees of *A.* alone. *Harvey v. Morgan*, 2 Starkie, 17.

7. The assignees under a joint commission against *A.* and *B.*, in suing on a separate contract entered into with *A.*, may describe themselves generally as the assignees of *A.*, without noticing the name of *B.* *Stonehouse and another v. De Silva*, 3 Camp. 399.

Baron and feme.

8. In an action against an attorney for suffering a debtor in custody at the suit of the plaintiff to be superseded, proof that such debtor was a married woman destroys the action, when the declaration states that she was indebted. *Quare*, Whether a declaration would be good without stating that the original defendant was indebted. *Lee v. Ayrton, Peake*, 119.

Bill of exchange  
and promissory  
note.

9. A stipulation indorsed on a promissory note by the payee is not to be taken as part of that instrument, without evidence that it was written at the time when the note was made. *Stone v. Metcalfe*, 4 Camp. 217.

10. In an action against the drawer of a bill of exchange, the declaration stated, that the defendants made the bill, "their own proper hands being thereunto subscribed," in fact, their firm of "*A.*"

"*A. and Co.*" was subscribed to the bill. The Judge refused to nonsuit for the variance. *Jones v. Mars*, 2 Camp. 305.

11. If a promissory note appears on the face of it to be the separate note of *A.* only, it cannot be declared on as the joint note of *A. and B.*, though given to secure a debt for which *A. and B.* were jointly liable. *Siffkin v. Walker*, 2 Camp. 308.

12. If a declaration states that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that date, the day in the declaration is immaterial, though not under a *vide licit*. *Coxon v. Lyon*, 2 Camp. 307. n.

13. But where the declaration alleged that the defendant on, &c. made his certain bill of exchange in writing, bearing date the same day and year aforesaid, and the real date of the bill was different, the variance was held to be fatal. 2 Camp. 308. n.

14. A bill of exchange, expressed on the face of it to be "for value delivered," is stated in pleading to be "for value received." This is not a material variance. *Jones v. Mars*, 2 Camp. 306.

15. In declaring on a promissory-note payable by instalments, if any one of the days on which an instalment is made payable be incorrectly stated, the variance is fatal. *Wells v. Girling*, 1 Gow. 21.

16. An allegation in a declaration that a bill of exchange was presented for payment by *T. S.* does not render it incumbent on the plaintiff to show that a presentment by *T. S.* was made. The material allegation is the presentment, and by whom it was made is immaterial. *Boehm v. Campbell*, 1 Gow. 55.

17. Where a bill of exchange is payable a specified number of days after sight, the real day of presentment for acceptance need not be alleged, a presentment on a day subsequent to that alleged may be proved. And in such case a subsequent allegation of presentment for payment when the bill became due and payable, is supported by proof of a presentment on the day when the bill in fact became due, according to the previous presentment. *Forman v. Jacob*, 1 Stark. 46.

18. In an action against the drawer or indorser of a bill of exchange dishonoured for non-payment after being accepted, although it be unnecessary to state the acceptance in the declaration, if it be stated, it must be proved:—but a promise to pay after the bill was due, is a sufficient admission of the acceptance as well of the handwriting of the defendant himself and of the other parties to the bill. *Jones v. Morgan*, 2 Camp. 474.

19. The maker of a promissory-note, payable at a specified time after sight, at the time of making it, writes in the margin, "*accepted by myself*;" these words constitute no part of the original instrument, and need not be noticed in the declaration. *Splitgerber v. Kohn*, 1 Starkie, 125.

20. An averment in a declaration that *A. B. and Co.* accepted a bill of exchange according to the usage and custom of merchants, is supported by evidence that the bill was accepted by *C. D.* their authorized agent, thus, "*For A. B. and Co. C. D.*" *Heys v. Heselstine*, 2 Camp. 604.

6. If there be a conditional promise to pay a bill of exchange presented for acceptance, after the condition has been performed, this cannot be declared upon as an absolute acceptance of the bill. *Langston and others v. Corney and others*, 4 Campbell, 176.

22. A foreign bill is accepted for the payment of 100*l. sterling*; the omission of the word *sterling* in the declaration is not a material variance. *Glossop v. Jacob*, 1 Starkie 69.



23. In an action against the maker of a promissory-note, payable to *A. B.* or bearer, if the declaration states that *A. B.* indorsed it to the plaintiff, this indorsement must be proved. *Waynam v. Bead*, 1 Camp. 175.

24. In an action by the indorsee of a bill of exchange, if the declaration states the indorsement to have been made before the bill became due, and it appears in evidence to have been made after the bill was due, this is not a material variance. *Young v. Wright*, 1 Camp. 139.

25. In an action by the indorsee of a bill indorsed by procurator, it should either be stated to have been so indorsed, or the words "his proper hand being thereunto subscribed" omitted. *Levy v. Wilson*, 5 Esp. 180.

26. In an action by the indorsee against the acceptor of a bill of exchange, the declaration stated that the payee indorsed it, his own proper hand being thereunto subscribed. It appeared that the payee's name upon the back of the bill was written under his authority, by his wife. *Semble*, that this is no variance; and at any rate the defendant is not at liberty to object that the indorsement is not in the hand-writing of the payee himself, after a promise, with a knowledge of this circumstance, to pay the bill. *Hemsley v. Loader*, 2 Camp. 459.

27. If a bill of exchange is accepted, payable at a particular place, in an action against the acceptor, this addition to the acceptance does not require to be noticed in the declaration, being no part of the contract, but merely a memorandum, where payment may be demanded. *Lyon v. Sundies*, 1 Camp. 423.

28. If a promissory-note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment. *Wild v. Rennards*, 1 Camp. 425. n.

29. In an action against the maker of a promissory-note expressed to be payable at a particular place, there is no necessity for proving that it was presented there for payment. *Nichols v. Bowes*, 2 Camp. 498.

30. Held, by court of *C. P.* that if a bill of exchange be accepted payable at a particular place, in an action against the acceptor, the plaintiff must prove that it was presented there for payment when it became due. *Collahan v. Aylett*, 2 Camp. 549.

31. But subsequently determined in *K. B.* that it is no cause of demurrer to a declaration against the acceptor of a bill of exchange accepted, payable at a particular place, that it does not allege that the bill was presented there for payment. *Fenton v. Goundry*, 2 Camp. 656.

32. If a promissory-note is made payable at a particular place, it is a fatal variance to omit to state this in declaring on the note. *Roche v. Campbell*, 3 Campbell, 247.

33. Where the drawer of a bill of exchange makes it payable at a particular place, this is part of the contract, and must be mentioned in describing the bill in the declaration. *Hodge v. Fillis and others*, 3 Campbell, 463.

34. Where a bill of exchange is drawn payable in London, and it is accepted payable at a *London* banker's, in an action against the acceptor, a presentment for payment there is a material averment, and must be proved at the trial. *Hodge v. Fillis and others*, 3 Campbell, 463.

35. If a place of payment is mentioned in the margin, or at the foot of a promissory-note, this is no part of the contract, but a mere memorandum; and in an action on the note, there is no occasion to prove

prove that it was presented there for payment. *Price v. Mitchell*, 4 Campbell, 200.

36. The whole of a promissory-note being printed, except the names, dates, and sum, and a place of payment inserted at the bottom of the note being also printed, a special presentment there is necessary. *Trecothick v. Edwin*, 1 Starkie, 468.

37. A bill is drawn payable in *London*, and is accepted payable at a particular banker's in *London*; *semble*, a presentment at that banker's must be proved in an action against the acceptor. *Garnett v. Woodcock and others*, 1 Starkie, 475.

38. In an action by an indorsee against the acceptor of a bill of exchange, the declaration alleges an acceptance and an appointment by the acceptor to pay at a particular place, and promise to pay according to the tenor and effect of the acceptance and a special presentment; *semble*, the allegation of the presentment may be rejected as surplusage. *Macbride v. Woodruffe*, 2 Starkie, 253.

39. The maker of a promissory-note by a note at the foot makes it payable at a particular place, an allegation (after stating the promise to pay in the usual manner) that the defendant then and there made the note payable at the particular time does not amount to a misdescription of the note. *Hardy v. Woodrooffe*, 2 Starkie, 319.

40. In an action against the acceptor of a bill of exchange, made payable at a particular place, by a memorandum at the foot of the bill, it is not necessary to prove a presentment or demand at *that* place, but the acceptor is generally and universally liable. *Head and another v. Sewell*, 1 Holt, 363.

41. A bar across a public bridge kept locked except in times of flood is conclusive evidence that the public have only a limited right to use the bridge at such times; and if an indictment for not keeping it in repair states that it is used by the king's subjects "at their free will and pleasure," the variance is fatal. *Rex v. Marquis of Buckingham and others*, 4 Campbell, 189. Bridge.

42. In an action against a carrier for not taking care of and safely carrying goods according to his promise, it appears that he had limited his responsibility as a carrier by means of a notice, of which the plaintiff was cognisant, the plaintiff having declared against the defendant as a carrier in the usual form cannot insist that the goods were lost from the defendant's warehouse before the actual carriage of the goods commenced. *Roskell v. Waterhouse and another*, 2 Stark, 461. Carrier.

43. In an action of assumpsit against a carrier for the loss of goods, where a contract is alleged to carry them from *A.* to *B.*, a variance in evidence as to the termini is fatal. *Tucker v. Cracklin*, 2 Stark, 385.

44. There are two offices of meters, the principal and the deputy. A description of a party as meter is satisfied by proof that he is either. *Davy v. Lowe*, 5 Esp. C. 70. Coal meter.

45. Under an allegation by way of special damage that the plaintiff had thereby lost divers lodgers, (without naming any,) he cannot prove the loss of a particular lodger. *Westwood v. Cocone*, 1 Starkie, 172. Consequential damage.

46. In an action for false imprisonment, the declaration averred that plaintiff was a constable of a particular parish, and in the due execution of his said office as such constable; but it appeared, that though a constable inhabiting and acting in this parish, he was elected by the lect jury, and sworn in to serve for a whole liberty, of which

which the parish formed a part; held to be a fatal variance. *Goodes v. Wheatley*, 1 Camp. 231.

## Contract.

47. Where a party undertakes to describe a contract, the whole must be set out; *secus*, where he only uses it as evidence of his claim in the declaration. *Baptiste v. Cobbold*, 2 Esp. C. 536; S. C. 1 B. and P. 7.

48. In suits *ex contractu* such parts only of the defendant's promise the breach of which is complained of need be stated. *Baptiste v. Cobbold*, 2 Esp. C. 536; S. C. 1 B. and P. 7.

49. In declaring on a contract, it is unnecessary to state terms which have been added since its conclusion, and which do not affect the nature of it. *Baptiste v. Cobbold*, 2 Esp. C. 536.

50. A contract to deliver "soil" is misdescribed as a contract to deliver "soil or breeze," the two things being different. *Clark v. Manstone*, 5 Esp. C. 239.

## Court.

51. An averment in an information for contemptuous behaviour to a court, that the court consists of *A. B.* and *C.* is made out by a bye-law, enacting, that *A. B.* and *C.* are sufficient to hold the court, although others may be present, and act as members of it. *Rex v. Campbell*, 1 Camp. 91.

## Covenant.

52. In an action of covenant, it is no objection under the plea of *non est factum*, that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration. *Gordon v. Gordon*, 1 Starkie, 294.

53. In covenant for not repairing, if the covenant to repair contains an exception of "fire and all other casualties," it is fatal on *non est factum* to state it as a general covenant to repair, omitting the exception. *Tempany v. Burnard*, 4 Campbell, 20.

54. In covenant, if after a plea of *non est factum*, the defendant at the trial admits the due execution of the specialty mentioned in the declaration, he may still take advantage of a variance. *Goldie v. Shuttleworth*, 1 Camp. 70.

## Deposition.

55. An indictment for perjury in a written deposition before a magistrate, in which a word necessary to the sense had been omitted in setting out the substance and effect of the deposition, supplied a word according with the sense, as if it had actually stood in the deposition. Held to be a fatal variance. The deposition should have been literally set out, and the meaning explained by an innuendo. *Rex v. Taylor*, 1 Camp. 404.

56. If a court in an indictment for perjury undertake to set out continuously the substance and effect of what the defendant swore when examined as a witness; it is necessary, in support of this court, to prove that in substance and effect he swore the whole of that which is thus set out as his evidence, although the court contains several distinct assignments of perjury. *Rex v. Leefe*, 2 Camp. 134.

## Ejectment.

57. In ejectment on the several demises of three persons, each demise being of the whole, the lessors of the plaintiff are entitled to a verdict upon evidence that they jointly granted a lease to the defendant. *Doe v. Fenn*, 3 Camp. 190.

## Election.

58. In an indictment for perjury before a select committee of the House of Commons, it was averred, that an election was had for a borough "by virtue of a certain precept of the high sheriff of the county, by him duly issued to the bailiff of the said borough of *N. M.*" Held, that this was not a description of the precept, and that although the borough was therein differently denominated, the variance was immaterial. *Rex v. Leefe*, 2 Camp. 139.

59. But

59. But the indictment having stated that "*A. B. and C. D. were returned to serve as burgesses for the said borough of N. M.*" This was considered a description of the indenture of returns, and the borough being therein styled the borough of *M.*, the variance was held fatal. *Rex v. Loeffe*, 2 Camp. 141.

60. If an indictment on 30 G. 2. c. 24. avers, that the defendant on false pretences obtained a sum of money, being the proper monies of *A.*, and it appears in evidence that the money was obtained from *B.* acting as *A.*'s servant, who had not then in his possession any money belonging to *A.* but afterwards was repaid by him the sum delivered to the defendant; this is a fatal variance. *Aliter*, if *B.* at the time had in his possession a sum belonging to *A.* equal to that delivered to the defendant. *Rex v. Douglas*, 1 Camp. 213. False pretences.

61. An indictment for obtaining money by false pretences stated, that the defendant pretended that he had paid a sum of money into the Bank of *England*. It appeared that he said generally, the money had been paid into the Bank of *England*. Held to be a fatal variance. *Rex v. Plestow*, 1 Camp. 494.

62. In an action for a false return to a writ, the cause of action against the original defendant must be framed in the manner laid. *Parker v. Fenn and another*, 2 Esp. C. 477. n.

63. Upon an indictment for winning more than £10 at one sitting &c. under the statute of 9 Ann, c. 14. s. 5. the defendant may be convicted of winning a less sum than that stated in the indictment. *Rex v. Darley and others*, 1 Starkie, 359. Gaming.

64. If the defendant pleads to an action of debt on bond, that the bond was given for money won by gaming, and specifies the name of the game at which the money was won, he must prove that the bond was given for money won at the particular game specified. *Mazzeighi v. Stephenson*, 1 Camp. 291.

65. An indictment describing a road from *A.* to *B.* and thence to *C.*, describes a direct communication. *Rex v. Great Canfield*, 6 Esp. C. 136. Highway.

66. If the description of an highway in an indictment for the non repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement, and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. *Rex v. Inhabitants of Hammer-smith*, 1 Starkie, 357.

67. The inhabitants of a parish plead, that the inhabitants of a particular district are bound by prescription to repair all common highways, situate within that district, save and except one common highway within the said district; the plea may be supported, although it appears, that the excepted highway is of recent date. *Rex v. The Inhabitants of Ecclesfield*, 1 Starkie, 393.

68. Where a policy in the common printed form on ship and goods contains a written memorandum, declaring the insurance to be on goods, a general averment is proper, that the defendant became an insurer on the premises in the policy mentioned. *Haughton v. Ewbank*, 4 Campbell, 89. Insurance.

69. Proof of an interest, however small, throughout the entire property insured, will support the averment in a declaration on a policy that the party is interested in the subject matter, to a large amount, to wit, to the amount of all the money ever insured thereon. *Page v. Fry*, 3 Esp. C. 185; S. C. 2 B. and P. 240.

70. A policy is effected on the plaintiff's share of goods, valued at £500., but upon its turning out that the plaintiff's interest was larger, the

the words are added in the margin of the policy, "on the plaintiff's share of goods, (say one-fifth) valued at £1000.," to which the defendant's initials were subscribed. The declaration need not notice the original stipulation. *Robinson v. Tobin*, 1 Starkie, 336.

71. *Semble*, that if a declaration on a policy of insurance lay the loss by the perils of the seas, the plaintiff may recover, upon proof, that the ship was wrecked, although this may have been occasioned by the barratry of the master or mariners. *Hayman v. Parish*, 2 Camp. 149.

72. An averment of loss by perils of the seas, is not supported by proof, that the vessel was sunk in consequence of being fired upon by another vessel, under a mistake. *Cullen v. Butler*, 1 Stark. 138.

Issue.

73. A recital that *an* issue came on to be tried, is supported by evidence, that an information containing *several* counts, to *each* of which the general issue was pleaded, was so tried. *Rex v. Jones, Peake*, 37.

74. Where to an information in the exchequer for having goods, knowing them to have been run, the defendant pleads not guilty, such plea only puts in issue the fact of defendant's possession and knowledge; and if, in stating the record, it is said that the issue was touching and concerning the forfeiture of the goods, it is a fatal variance. *Rex v. Hawkins, Peake*, 8.

Lease.

75. Averment in a declaration that plaintiff was possessed of premises for the remainder of a certain term of years then unexpired therein, which he agreed to assign to the defendant, is supported by evidence of a tenancy from year to year. *Botting v. Martin*, 1 Camp. 317.

76. In an action for a nuisance to a dwelling-house, the declaration stated, that at the time of stating the grievance, plaintiff was seized in fee of the dwelling-house, and that it was then in the possession and occupation of a certain tenant or certain tenants thereof under plaintiff. It appeared that plaintiff was seized in fee for the use of the inhabitants of a particular parish, and that the house was occupied by the parish paupers and a person appointed by the parish officers to take charge of them. Held, that neither the poor nor the master of the work-house could be considered as tenants to the plaintiff, and that this was a fatal variance between the declaration and the evidence. *Martin v. Goble*, 1 Camp. 320.

Libel.

77. In an action for a libel, if separate passages of the libel are to be set out in one count of the declaration, they ought to be described as separate and distinct from each other. *Tabart v. Tipper*, 1 Camp. 352.

78. The defendant may be found guilty upon a count in an information which charges him with having composed, printed, and published a libel, if he is proved to have published without having composed it. *Rex v. Hunt*, 2 Camp. 583.

79. If the defendant is charged by a count in an indictment with having "composed, printed, and published" a libel, if the evidence be, that he only composed and published it, he may be found guilty of composing and publishing, and acquitted of the printing. *The King v. Williams*, 2 Camp. 646.

Locality.

80. Parishes united by Act of Parliament, are distinct parishes for all other purposes except the maintenance of their poor; hence, in an ejectment, premises situate in the parish of *A.* cannot be described as situate in the united parishes of *A.* and *B.* *Goodtitle, ex dem. Pinsent v. Lammiman*, 6 Esp. C. 128., 2 Camp. 274.

81. In trespass, where there are two independent parishes in one district, as *St. John's* and *St. James's* in Clerkenwell, if, the trespass  
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be stated to have been committed in Clerkenwell generally, and be proved to have been committed in the parish of St. James's, it is a fatal variance. *Taylor v. Hooman*, 1 Holt, 523.

82. In an action for suspending a lamp before plaintiff's house, to denote that he kept a brothel, the parish in which the declaration states the house to have stood, and the tort to have been committed, is to be considered as *venue* merely, not as local description: and it is immaterial whether there be any such parish in existence. *Jefferies v. Duncomb*, 2 Camp. 3.

83. In an action on a promissory note made and dated in a foreign country, the declaration, without noticing that circumstance, may allege, that it was made in the county in which the *venue* is laid. *Houriet and others v. Morris*, 3 Camp. 304.

84. In an assumpsit for the use and occupation of premises, they are described as situated in X. instead of Y., the variance is fatal. *Wilson v. Clark*, 1 Esp. C. 273.

85. In an action for use and occupation, although it be unnecessary to state in the declaration in what parish the premises are situate, if this is alleged, a variance in the name of the parish is fatal. *Guest v. Caumont*, 3 Camp. 235.

86. In trespass *quare clausum fregit*, where the *locus in quo* is stated to be in the parish of A., it is enough if A. has a church and overseers of its own, and is reputed a parish, although perhaps strictly speaking it may be only a hamlet. 2 Camp. 5, n.

87. In an action on a penal statute, it is sufficient that the offence is proved to have happened in the same county, though in a different parish, to that laid in the declaration, unless the poor of the parish share in the penalty. *Clark v. Taylor*, 3 Esp. C. 218.

88. An averment that an order had been made to land goods at the quay or wharf appointed by law, is not proved by evidence of an order to land them at the king's warehouse, though it stands on the quay or wharf. *Rex v. Cassano*, 5 Esp. C. 231.

89. An averment that a specific sum was given for the insurance of a particular lottery ticket is not proved by evidence that the sum was for the insurance of that ticket and others. *Phillips v. Mendez Da Costa*, 1 Esp. N. P. C. 59. Lottery.

90. If in an action for a malicious arrest, the declaration avers that B. the defendant had no cause of action against A., the plaintiff, to the amount of £10, and it appears that A. was indebted to him above that sum, although not nearly to the amount sworn to in the affidavit to hold to bail, the action cannot be supported; as A. should have declared against B. for maliciously holding him to bail for a greater sum than was really due. *Wetherden v. Embden*, 1 Camp. 295. Malicious arrest.

*Wilkinson v. Mawbey*, 1 Camp. 297.

91. But if in fact B. was largely indebted to A. on a balance of accounts, and had only a cross demand upon him for a different cause from that mentioned in the affidavit to hold to bail, then the above averment is not falsified, as in that case A. did not owe B. £10, and B. had no cause of action for which he could lawfully hold A. to bail. *Wetherden v. Embden*, 1 Camp. 297.

92. In an action for a malicious arrest, an allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ, is not supported by evidence that he paid the debt, and £10 for costs, into the hands of the sheriff; but he may still maintain the action, although he cannot recover for the consequential damage. *Bristow v. Haywood*, 4 Camp. 213. S. C. 1 Starkie, 48.

93. Averment, that A. before a magistrate maliciously charged B. with Malicious prosecution.

with felony; the information contains a mere charge of tortious conversion, upon which a warrant for felony was improperly founded; the variance is fatal. *Tempest v. Chambers*, 1 Starkie, 67.

94. A declaration in an action for a malicious prosecution, which alleges that the defendant charged the plaintiff with felony, is supported by evidence, that the defendant stated to the magistrate, that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. *Davis v. Noak*, 1 Starkie, 377.

Money.

95. *A.* agrees to remunerate *B.* for information, whereby he may be enabled to recover a sum of money as residuary legatee. In an action on the agreement by *B.*, it was averred that *A.* recovered a large sum of money in consequence of the information; the proof was of the recovery, not of money, but stock; held, that the variance was fatal. *Jones v. Brindley*, 3 Esp. C. 205.

Names.

96. If the plaintiff declares by a wrong christian name, this is no ground of nonsuit at the trial, if it can be shewn that the defendant knew that the action was brought by the person who actually sues. *Boughton v. Frere*, 3 Camp. 29.

97. A plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may show by evidence that he was the person intended. *Willis v. Barrett*, 2 Starkie, 29.

98. In an indictment for perjury, it is alleged, that *Francis Cavendish Aberdeen* and others, exhibited their bill in the exchequer, &c. On production of the bill, it purports to be the bill of *J. C. Aberdeen* and others; this is no variance, and it may be proved that this was the bill of *Francis Cavendish Aberdeen*. And there is no variance, although, after the allegation, and after setting out such parts of the bill as are necessary, the words are added "as appears by the said bill and filed of record." *Rex v. Roper*, 1 Starkie, 518.

99. The mis-description of a contract is a fatal variance as where it is stated to have been made with two instead of three, though it is alleged as inducement only, and by agreement between those three, the two were to have the sole benefit. *Parish v. Burwood* and another, 5 Esp. C. 33.

100. If in an action on a bond against one it be declared as the joint bond of him and two others, it is no variance, that the bond is likewise the separate bond of each of the obligors. *Middleton v. Sandford*, 4 Camp. 34.

101. The misnomer of one of several partners sued jointly, is only pleadable in abatement, and no ground of nonsuit. *Rogers v. Boehm* and others, 2 Esp. C. 702.

102. A partnership payment may be stated as having been made by those who really composed the firm in exclusion of nominal members; though made by bills drawn on the firm. *Harrison v. Fitzhenry*, 3 Esp. C. 232.

103. An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed. *Moller v. Lambert*, 2 Camp. 548.

104. A bill of exchange drawn in this form, "Pay to our order," &c. signed in the name of *two persons & Co.*, and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm; and if it be proved, that the firm consists of only one person, yet it is not a variance. *Bass and another v. Clive*, 4 M. and S. 13. S. C. 4 Camp. 78.

105. An allegation, that a policy has been effected for the plain-  
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tiffs by *A.*, *B.*, and *C.*, is satisfied by proof that it was effected by the firm *A.* and *B.*, there being in fact two firms which have two members in common. *Dickson v. Lodge*, 1 Starkie, 226.

106. Though a surviving partner may declare for goods sold without naming himself such; yet a description of the goods as his own is a fatal variance. *Ditchburn v. Spracklin and others*, 5 Esp. C. 32.

107. In an action by a surviving owner for use and occupation of premises, it is not sufficient to allege that the defendant held the premises by the sufferance and permission of the surviving owner only, where they were in fact held under two jointly. *Israel v. Simmons*, 2 Starkie, 356.

108. In covenant on a lease, a mistake in the name of the person stated in the demise as late tenant of the premises, is a fatal variance. *Bowditch v. Mawley*, 1 Camp. 195.

109. Where a writ is stated in pleading, a mis-spelling of a name, though the two sound alike, is fatal. *Brown v. Jacobs*, 2 Esp. C. 726.

110. A variance between the real name of an indorser and that which is alleged in the declaration, and appears upon the bill, is immaterial. *Forman v. Jacob*, 1 Starkie, 47.

111. A declaration alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery. *Samuel v. Darch*, 2 Starkie, 60.

112. A declaration premised that one *A.*, widow, had sued out a writ, and stated the writ to be "that the sheriff was commanded to take, &c. to answer the *said A.*," omitting to add "*widow.*" The writ produced described *A.* as *widow*; Held, that there would have been a fatal variance, but that the word of reference "*said*" incorporated in the sentence of which it was a part that to which it referred. *Ions v. Perchard and another*, 2 Esp. C. 507.

113. To describe an accident as having arisen from the negligent steering, managing, and directing a vessel, which arose from the negligent stowing of the anchor, is a fatal variance. *Hullman v. Bennett*, 5 Esp. C. 226. Negligence.

114. A schoolmaster who permits an infant pupil under his care to make use of fire-works, is responsible in an action for the mischief which ensues. But if the declaration allege that the defendant (in such an action) delivered the fire-works to the pupil, and caused and procured them to be delivered to him, and it turn out that though the defendant had permitted the use of fire-works by his pupils, that the fire-works from which mischief resulted, had, in fact, been delivered to the pupil by another person, without the authority or knowledge of the defendant, the variance will be fatal. *King v. Ford*, 1 Starkie, 421.

115. If issue is taken on a plea in abatement of partnership, and the defendant can prove that any one item of the plaintiff's bill of particulars was furnished on the partnership account, he is entitled to a verdict. *Colson and another v. Selby*, 1 Esp. C. 452. Partnership.

116. It is a fatal variance to describe a patrol, or one not sworn to preserve the peace, as a peace-officer. *Cliffe v. Littlemore*, 5 Esp. C. 39. Peace officer.

117. An averment of the performance of conditions precedent, is sufficiently established by proof that the other party had dispensed with it. *Sed quare*. *Knight v. Crockford*, 1 Esp. N. P. C. 190.



Poor.

118. In stating an order of removal, one of the magistrates was described as an esquire, and both as justices for the county; in the order itself, the one was described as a clerk, and both as justices of a liberty within the county; the variance was held fatal. *Rex v. Tanner and another*, 1 Esp. C. 304.

Prescription.

119. In trespass for breaking and entering a several fishery, if the plaintiff prescribes for the sole and exclusive right of fishing over four places in a navigable river, upon which right issue is joined, the prescription must be proved as extensive as it is laid; and if the right is shown to exist over three of these places, but not the fourth, this is a fatal variance, notwithstanding that the trespasses complained of were committed in a part of the river where the sole and exclusive right of fishery prescribed for is proved to exist. *Rogers v. Allen*, 1 Camp. 313.

Process.

120. An indictment for perjury, stating a bill of *Middlesex* to have issued out of the office of the chief clerk of the Court of King's Bench is bad. *Rex v. Schoale, Peake*, 112.

121. In stating a writ in which the party is described by an addition, the addition may be omitted; but if an addition be stated where there is none in the writ, the variance is fatal. *Brown v. Jacobs*, 2 Esp. C. 727.

122. In an action on a bail bond against one of the sureties, the declaration averred, that by a writ of *latitat* the sheriff was commanded to take "one *Francis J.* by the name of *John J.*"; Held, that this averment was not supported by evidence of a *latitat* in the common form, commanding the sheriff to take *John J.*; although the bail-bond was signed by the principal, "*Francis J.* arrested by the name of *John J.*," and the plaintiff offered to prove that this person was their debtor, whom they meant to hold to bail. *Scandover v. Warne*, 2 Camp. 270.

123. In an action for a false return to a *fi. fa.* the indorsement on the writ was stated to be, "to levy the sum, together with the sheriff's poundage, officer's fees, and other legal charges and incidental expences attending the same;" the indorsement was "to levy the sum together with the sheriff's poundage, officer's fees, &c.": Held a fatal variance. *Stiles v. Rawlins and another*, 5 Esp. C. 133.

124. A writ directed generally to the sheriff of a county, may be described in pleading as directed to the individual by name, who was in fact sheriff of the county when the writ issued. *Batchelor v. Salmon*, 2 Camp. 325.

125. In an action of escape out of execution, the declaration alleged that the prisoner was by *habeas corpus* brought before a judge of K. B., and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears:" Held that evidence of a commitment by a judge of K. B. but not filed of record would not support the action. Held, also, that the above allegation, even if unnecessary, must be proved as laid. *Turner v. Eyles*, 5 Esp. C. 8.; S. C. 3 B. & P. 456.

126. A prisoner superseded by order of a judge at chambers, is so, not by the judge, but by the writ of *supersedeas*, which being an act of the court, he may be stated to have been discharged by the court. *Brown v. Jacobs*, 2 Esp. C. 727.

Record.

127. It is not a fatal variance from a record to omit the description of a person named in it, unless some ambiguity is thereby produced. *Amey v. Long*, 1 Camp. 15.

Sale.

128. An averment, in an action for an escape, that the prisoner, when

when arrested, was indebted for goods sold, is not proved by evidence that the credit on which the goods were sold had not then expired. *White v. Jones*, 5 Esp. C. 160.

129. If an agent for the sale of horses sells to *A.*, in one lot and at an entire price, a horse belonging to *B.*, and another belonging to *C.*, warranting both horses to be sound; *A.* cannot maintain *assumpsit* against *B.* for the unsoundness of the horse which belonged to the latter, declaring as upon a sale of one horse, since the contract concerning the two horses was entire. *Symonds v. Carr*, 1 Camp. 361.

130. Where goods are purchased by several on their joint account, to be afterwards divided in certain proportions between them, it is a fatal variance to describe the contract as a separate sale to each of his proportion. *Everett v. Tindall*, 5 Esp. C. 169.

131. An agreement to take on board a specific quantity cannot be stated as an agreement to take a full cargo, though the quantity may amount to such. *Harrison v. Wilson*, 2 Esp. C. 708. Ship.

132. Admitting that in slander it is sufficient to prove the substance of the words, yet that confines the plaintiff to the proof of words of a precisely similar import with those laid. *Harrison v. Stratton*, 4 Esp. C. 218. Slander.

133. Where a slanderous charge consists of several parts, and the sense is materially altered by the subtraction of any one part from the rest, the whole must be stated and proved; but where the charge is not thus entire, the whole need not be stated, and, if stated, need not be proved. *Flower v. Pedley*, 2 Esp. C. 491.

134. An averment that slanderous words were spoken concerning the (three) plaintiffs in their joint trade, is not supported by evidence of words addressed by the defendant personally to one only of the partners. *Solomons and others v. Medex*, 1 Starkie, 191.

135. In an action for slander, it is alleged that the words were spoken of and concerning certain soap alleged by *A. B.* to have been stolen. The declaration is not supported by evidence that the words were spoken concerning certain soap, alleged by *A. B.* to have been taken out of his yard. *Shepherd v. Bliss*, 2 Starkie, 510.

136. An action brought to recover a particular sum of money, may be described in pleading "as an action for the recovery of the said sum of money," although in form it was an action of trover. 2 Camp. 526. Suit.

137. It is a fatal variance to describe a judgment as for the breach of several promises, which was given for the breach of one promise only. *Read v. Borradaile and others*, 5 Esp. C. 223.

138. In an action against the sheriff for a false return to a *fi. fa.*, on a judgment in *sci. fa.*, the declaration stated that the judgment was for 269*l.* debt; the record produced showed that it was for 1*s.* damages, and 36*l.* costs as well: Held, that as these were stated as distinct sums on the record, the variance was immaterial. *Phillips v. Eamer and another*, 1 Esp. C. 355.

139. An averment that a cause was tried in the court of King's Bench before the lord chief justice of the said court, is descriptive of a trial at bar, and therefore not supported by proof of a trial at *Nisi Prius*. *Rex v. Brett*, 5 Esp. C. 259.

140. In an action for a malicious prosecution, an allegation in the declaration that the person prosecuted was acquitted by a jury in the court of our lord the king, before the king himself, at *Westminster*, before the chief justice, is not supported by a record, from

from which it appears that the trial took place before the Chief Justice at *Nisi Prius*. *Woodford v. Ashley*, 2 Camp. 193.

141. In an indictment for perjury, in an answer to a bill in chancery, the bill was stated to have been filed by *A.* against *B.* (the now defendant) and another. In fact, it was filed against *B.*, *C.*, and *D.*; but the perjury was assigned on a part of the answer which was material between *A.* and *B.* This held not to be a fatal variance. *Rex v. Leefe*, 2 Camp. 141.

Surplusage.

142. Where special damage is laid in the declaration, it need not be proved, unless the plaintiff has no cause of action without it. *Cook v. Field*, 3 Esp. C. 133.

143. Though a protest is unnecessary in the case of inland bills, and, therefore, though made, need not be stated in declaring on them; yet, if stated, it must be proved. *Boulager v. Talleyrand*, 2 Esp. C. 550.

144. An introductory description in the declaration by the plaintiffs, the payees of a bill of exchange, in an action against the acceptor, representing them as the executors and trustees of a person deceased, is mere surplusage, and does not require proof, the bill being in fact payable to them in the name of a firm which they had assumed. *Agutter v. Moses*, 2 Starkie, 499.

145. In escape against the sheriff, if the plaintiff avers in his declaration that *J. S.* was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. *Webb v. Hearne* and another, 2 Esp. C. 671.; S. C. 1 B. & P. 281.

146. *Quære*, Whether in an action for libelling a newspaper, the plaintiff may recover, on proof that he is only proprietor, having averred that he was editor as well? *Heriot v. Stuart*, 1 Esp. C. 438.

147. In an action on the case for exhibiting an inscription opposite to the plaintiff's house, insinuating that it was a house of ill-fame, a prefatory allegation that the plaintiff carried on the business of a retailer of wines there, may be rejected as surplusage, there being no allegation that the publication was of and concerning the plaintiff as such retailer of wines. *Spall v. Massey*, 2 Starkie, 559.

148. A declaration under the statute 49 G. 3. c. 126, s. 6. alleges that the defendant advertised a proposal for a promise to give the sum of 150 guineas to any one who would procure *A. B.* a place under government; the words "for a promise" may be rejected as surplusage. *Q.* The words "under government" are sufficient, though the words of the statute are "office, in the gift of the crown." *Clarke v. Harvey*, 1 Starkie, 92.

Statute.

149. A general allegation in an action for a penalty for acting as a magistrate without a qualification, following the words of the statute, without specifying any particular act, is good after verdict. *Wright v. Horton*, 1 Starkie, 400.

150. Where the defendant, being a porter, delivered, along with a basket of fish, a false ticket, denoting that 9s. 10d. instead of 6s. 6d. was to be paid for it: Held, that in an indictment for this offence, on 30 G. 2. c. 24. the basket of fish might be described as a parcel; but that if the indictment had been on 39 G. 3. c. 58. which enumerates baskets, parcels, &c. specifically, this would have been a fatal variance. *Rex v. Douglas*, 1 Camp. 212.

Time.

151. In declaring against the acceptor of a bill of exchange payable a certain time after sight, the day of accepting the bill laid in the declaration under a *videlicet* is immaterial. *Freeman v. Jacob*, 4 Camp. 209.; S. C. 1 Starkie, 46.

152. In

152. In an assignment of perjury, it is alleged, that the defendant, at the time of effecting a policy of insurance, purporting to have been underwritten by *A.*, *B.*, and *C.*, and others, on a day specified, well knew, &c. On producing the policy, it appears that *A.* underwrote the policy on a different day; the defect is fatal, although it appears that *B.* *C.* &c. did underwrite the policy on that day. *Rex v. Hucks*, 1 Starkie, 521.

153. In an action for usury, the day on which the money is stated to have been lent must be proved as laid, though under a *videlicet*. *Harris v. Hudson*, 4 Esp. C. 152.

154. In trespass *quare clausum fregit*, laid to have been committed on a particular day, and on divers other days and times, between that day and the exhibiting of the bill, &c.; the plaintiff may prove an act of trespass anterior to the day specified, but he will be confined to that single act. *Hume v. Oldacre*, 1 Starkie, 351.

155. In an indictment for perjury alleged to have been committed in the defendant's answer to a bill of discovery filed in the exchequer, it is alleged, that the bill was filed on a day specified. The day is not material, where it is not alleged as part of the record; and therefore there is no variance, although the bill, when produced, is found to be entitled generally of a preceding term. *Rex v. Hucks*, 1 Starkie, 521.

156. On an indictment for a misdemeanor, containing several counts alleging several misdemeanors of the same kind on the same day, the prosecutormay give evidence of such misdemeanors on different days. *Rex v. Levy and others*, 2 Starkie, 458.

157. Averment that defendant exercised the trade of a sawyer; Trade. proof that he only excercised it as subordinate to that of a maste-maker: Held a fatal variance. *Spencer v. Mann and others*, 5 Esp. C. 110.

158. In an indictment against a bankrupt, the petitioning creditor's debt is alleged to be due to *A.*, *B.*, and *C.*, surviving executors of the last will and testament of *D.*, after proof that *A.*, *B.*, and *C.*, were the executors, and were directed by the will to carry on the business, it is necessary to prove that they all assented to act in discharge of the trust. And a general admission by the prisoner of a debt due to the executors of *D.*, will not supply the defect. *Rex v. Barnes*, 1 Starkie, 243. Trust.

159. If more than legal interest is taken for forbearance on a note given to *A.* by *B.*, as a collateral security for money lent to *C.*, such usury is well described to be for forbearance of money lent by the defendant to *B.* *Manners v. Postan*, 4 Esp. 241.; S. C. 3 B. & P. 343. Usury.

160. If in pleading it is stated, "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment, to prove that the vestry has consisted of a definite number. *Berry v. Banner, Peake*, 157. Vestry.

161. So if it had been stated, that the vestry was composed of a certain select number of persons; *comme semble*, a select vestry cannot be constituted by a faculty from the bishop. *Berry v. Banner, Peake*, 157.

162. A contract for a yearly service at a specific salary, must be proved as alleged, although both the time and sum are averred under a *videlicet*. *Preston v. Butcher*, 1 Starkie, 3. Videlicet.

163. An indictment against *A.*, *B.*, *C.*, and *D.*, charged, that they conspired together to obtain, "viz. to the use of them the said *A.*, *B.*, and C c 3

and C., and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction: Held, that the averment concerning the application of the money was material, though coming under a *videlicet*; and that as to D., the conspiracy was not proved as laid. *Rex v. Pollman*, 2 Camp. 231.

*Evidence. — Proofs.*

Miscellaneous points.

1. Though a party, in his opening, assert what is presumptive in his favour, yet, if he do not adduce evidence to prove the fact, the other party cannot, cross-examine his witnesses as to the truth of it. *Lucas v. Novosilieski*, 1 Esp. C. 296.

2. If a counsel, in opening for the plaintiff, read a letter of the defendant's, merely as introductory of the plaintiff's case, the letter is not to be considered as given in evidence by the plaintiff, but must be afterwards proved by the defendant as part of his own case, if he mean to rely upon it; *aliter* if the plaintiff's counsel read it as part of the plaintiff's case. *Willis v. Dyson*, 1 Starkie, 164.

3. A party is not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it. *Law v. Wells*, Peake, 93.

4. If the books of one party are called for, and inspected by the other without his using them, they are not thereby made evidence for the former. *Sayer v. Kitchen*, 1 Esp. N. P. C. 209. But see *Wharam v. Routledge*, 5 Esp. C. 235. *contra*.

5. A deed produced by one party on notice from the other, may be read without proof of the party's execution; in like manner, a copy may be read on his refusal to produce, without proving the execution of the original. *Doxon v. Haigh and another*, 1 Esp. C. 409. But see 8 East 549.; 3 Taunt. 60.

Production by the adversary.

6. Where an agreement not under seal is produced at the trial by one of the parties, in pursuance of an undertaking to produce it, the opposite party, to make it evidence, must prove it in the same manner as if it had come from his own custody. *Wetherston v. Edgington*, 2 Camp. 94.

7. A deed, produced by the attorney for the defendant when he executed it, but who is not his attorney in the cause, cannot be read without proving the execution. *Leith v. Post*, 1 Esp. N. P. C. 196.

8. If, in compliance with a notice, a writing is produced which refers to others with such particularity as to make it necessary to inspect them that the sense may be complete, the party producing it may insist on having these also read in evidence. *Johnson v. Gilson*, 4 Esp. C. 21.

9. Though the attorney in the cause, on being asked in court, acknowledges having received notice to produce a deed, yet if the notice cannot be proved by other evidence, he cannot be called upon to produce it. *Read v. Passer*, Esp. N. P. C. 216.

10. The notarial copy of the condemnation of a ship admitted as evidence by order of a court of equity, is only evidence of the fact of condemnation, not the ground upon which it proceeded. *Wright v. Barnard*, 2 Esp. C. 700.

Abortion.

11. Upon an indictment on 43 G. 3. c. 58. sec. 2. charging that the prisoner administered to a woman with child, but not quick with child, for the purpose of procuring abortion, a large quantity of certain "mixture to the jurors unknown then and there being a noxious and destructive

destructive thing," it is unnecessary to prove that the mixture was noxious or destructive, or even that the woman was actually with child. *Rex v. Phillips*, 3 Camp. 75.

12. On the trial of the accessory he may prove the principal, though already convicted, innocent. *Cook v. Field*, 3 Esp. C. 134. Accessary.

13. In an action of slander for charging the plaintiff with having been accessory to a felony, though the principal has been acquitted, the defendant may prove him guilty. *Cook v. Field*, 3 Esp. C. 134.

14. Since an acquittal does not, like a conviction, ascertain facts, it is no proof of innocence. *England v. Bourke*, 3 Esp. C. 80. Acquittal.

15. After putting in an inventory, it is for the administrator to discharge himself of the items which it contains. *Giles and another, v. Dyson and another*, 1 Starkie, 32. Administration.

16. If a plaintiff suing in trover as administrator is so described on the face of the declaration, and makes a *profert in curia* of the letters of administration, it is unnecessary, on not guilty pleaded, to produce them at the trial, although the cause of action accrued after the death of the intestate. *Watson and Wife v. King*, 4 Camp. 272.

17. What admissions may be given in evidence. *Slack v. Buchanan, Peake*, 5. Admissions.

18. An admission by a nominal party on the record, who sues as trustee for the benefit of another, is evidence in favour of the other side. *Bouerman v. Radenius*, 2 Esp. C. 653.; S.C. 7 T. R. 663.

19. Admissions of particular articles before an arbitrator are evidence, when made not with a view to a compromise, but while the parties are contesting their rights. *Waldrige v. Kennison and another*, 1 Esp. N. P. C. 143.

20. What an agent says at the time of a sale which he is employed to make, is evidence as part of the transaction of selling; but the principal is not bound by a representation of the agent at another time. *Peto v. Hague*, 5 Esp. C. 134.

21. Where a debtor refers his creditor to a third person, the declarations of that person after his death are evidence for the creditor. *Daniel v. Pitt*, 6 Esp. C. 74.

22. The admissions of the attorney in a cause, are evidence against his client only when they are made with a view to obviate the necessity of proving the facts admitted at the trial. *Young v. Wright*, 1 Camp. 140.

23. *A.* having deposited with *B.* 10*Q.*, to distribute amongst *A.*'s creditors in proportion to their claims; *A.*'s declaration is evidence in an action by *C.*, a creditor, against *B.* for his share, that he is a creditor to such an amount. *Robson v. Andrade*, 1 Starkie, 372.

24. An admission in answer to a bill filed by other creditors against the defendant, may be read as evidence against him. *Grant v. Jackson, Peake*, 203.

25. A bond given by the defendant, acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance in carrying on the same business in another place. *Rex v. Neville, Peake*, 91.

26. The declarations of a former tenant, touching a right of common claimed by the present as appurtenant to the premises, are evidence against the right, without calling the party himself. *Walker v. Broadstock*, 1 Esp. C. 458.

27. *Assumpsit* against four, three of whom have been out-lawed; an admission by the fourth, that he was in partnership with the other three, is evidence as against that fourth of a joint promise by all the four. *Sangster v. Mazarredo and others*, 1 Starkie, 161.

28. An admission by way of compromise to get rid of an action, is not evidence against the party. *Waldridge v. Kennison* and another, 1 Esp. N. P. C. 143.

29. The declarations of one, not party to the cause, and who is living, are inadmissible. *Milward v. Forbes*, 4 Esp. C. 173.

30. Where a minor sues by his guardian, the declaration of the guardian is not evidence against the plaintiff. *Cowley v. Ely*, 2 Starkie, 366.

31. A letter written by an agent (though not known to be such by the party to whom the letter was written), speaking of a ship as *his own ship*, is not conclusive against him in an action on a policy of insurance in which the question of ownership is raised. He may still prove that he is only an agent, and that others are in fact the owners of the vessel. *Tulloch v. Boyd*, 1 Holt, 487.

32. The affidavit of an agent, where himself can be called, is not evidence against the principal, unless the principal has made it such by using it on an application to the court to establish the fact therein deposed. *Johnson v. Ward*, 6 Esp. C. 47.

33. The declarations of the principal that he has received goods, are not evidence against a surety who has guaranteed the payment of such goods as shall be delivered to him. *Evans and another v. Beattie*, 5 Esp. C. 26.

34. In an action by the indorsee of a bill taken after it was due to prove payment to the indorser, himself should be called since his declarations are inadmissible. *Duckham v. Wallis*, 5 Esp. C. 251.

35. A bond is given to *A., B., and C.*, by the plaintiff and defendant, who were sureties for *D.* The plaintiff is obliged to pay the bond, and brings an action against his co-surety for contribution. A defence is set up that the principal had paid money, specifically on account of this bond, to one of the obligees, and that such obligee had carried it to the account of the bond: Held, that any declaration of the obligee upon *what* account he received the money, or how he applied it (unless such declaration was made at the time of payment), was not evidence; and that such obligee must be called as a witness. *Dunn v. Slee*, 1 Holt, 399.

36. In an action at the suit of a corporation, what is said by an individual member of it is not admissible evidence for the defendant. *Mayor of London v. Long*, 1 Camp. 24.

#### Adultery.

37. Where husband and wife necessarily live apart, her letters to the husband during their separation are evidence for him in an action of crim. con., if proved to have been written before any suspicions attached. *Edwards v. Crock*, 4 Esp. C. 39.

38. In an action for crim. con., the husband may give in evidence the wife's declarations as to where she was going, in answer to a defence that he connived at her elopement. *Hoare v. Allen*, 3 Esp. C. 276.

39. In an action for crim. con., a letter written by the wife to the defendant previous to the illicit intercourse, was admitted in mitigation of damages. *Elsam v. Faucett*, 2 Esp. C. 563. Reporter adds *quere*, and see B. N. P. 28.

40. Evidence of misconduct in the wife subsequent to the illicit connexion, is inadmissible in an action for crim. con. *Elsam v. Faucett*, 2 Esp. C. 562.

41. In an action for criminal conversation, proof that a letter produced corresponds, as to its contents, with a letter which the wife wrote to her husband whilst she was absent from him (before the criminal intercourse) upon a visit at the house of a friend, and which she

she read over to the witness, is sufficient to warrant the reception of the letter in evidence, although no explanation is given of the cause of their living apart, their being no ground to suspect collusion. The judgment which a witness forms from the conduct and expressions of the wife to her husband whilst she lives apart from him, as to her affection for him, is evidence. *Trelawney v. Colman*, 2 Starkie, 191.

42. An agent's letter is not evidence of an agreement against the principal, but the agent himself must be examined. *Maesters v. Abraham*, 1 Esp. C. 375. But see 10 Ves. jun. 127. Agent.

43. Where *B.*, through the medium of his agent, chartered a ship to *A.*, and engaged by the charter-party that she was sea-worthy; a letter written by that agent to a third person, previously to the charter-party being effected, tendering the ship for hire, is not admissible in evidence, since it did not form a part of the contract on which the action was founded, but the agent himself must be called. The declarations of an agent are only evidence against his principal where they form part of the contract which he is employed to negotiate on behalf of the principal. *Betham v. Benson*, 1 Gow, p. 43.

44. If *A.* refers *B.* for information upon any particular subject to *C.*, what *C.* says concerning it, when applied to by *B.* or his agent, is evidence for *B.* in an action against *A.* *Williams v. Innes*, 1 Camp. 364. *Daniel v. Pitt*, 1 Camp. 366. n. *Brock v. Kent*, ib.

45. Evidence that the son of the defendant, a minor, has in three or four instances signed bills of exchange for his father is sufficient, in an action against the father on a guarantee to warrant the reading of an instrument purporting to be a guarantee by the father in the hand-writing of the son. *Watkins v. Vince*, 2 Starkie, 368.

46. In an action on a policy of insurance subscribed by the defendant's agent under a power of attorney, it is sufficient proof of the agency, that the defendant is in the habit of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney. *Haughton v. Ewbank*, 4 Camp. 88.

47. A receipt signed by an agent for his principals, is not evidence to support an action for money had and received against him, to recover the money back. *Edden v. Read*, 3 Camp. 339.

48. To prove that a person was an alien enemy at the time of action brought, it is not enough to show that he was some time before domiciled in a territory which has become hostile, without showing that he was a native of that territory. *Harman v. Kingston*, 3 Camp. 153. Alien Enemy.

49. Where, to a plea of alien enemy, the plaintiff replied, that she was resident in this country by the licence and permission of our lord the king: *Held*, that it was not enough to prove that a licence was granted to her under 38 G. 3. c. 77. which expired with that statute, and that she has since continued to reside openly in this country without molestation. *Alciator v. Smith*, 3 Camp. 245.

50. If to a plea that *A.*, for whose benefit the action is brought, is an alien enemy, the replication state that *A.* is resident in this country by the licence of our lord the king; to support an issue taken upon this fact, it is not enough for the plaintiff to prove that a licence was granted by our king to *A.*, while an *alien amie* to undertake a voyage to a foreign country, and from thence to *England*, which did not terminate till after the commencement of hostilities between his country and ours, and that after the termination of the  
voyage



voyage he went about at large here, without being molested by the English government. *Boulton v. Dobree*, 2 Camp. 163.

Ambassador.

51. Official documents transmitted to government by our ambassadors in foreign countries communicating public proceedings there, are evidence. *Thelluson v. Cosling*, 4 Esp. C. 266.

Annuity.

52. In an action against an attorney for negligence in respect to the memorial of an annuity which he had prepared and carried in to be enrolled, an examined copy of the roll is *prima facie* evidence of the original memorial. *Baikie v. Chandless*, 3 Camp. 20.

Arbitration.

53. In an action on an award made under a judge's order; to prove the order, it is enough to put in an office-copy of the rule making it a rule of court. *Still and another v. Halford*, 4 Camp. 17.

54. In an action on an award made under a judge's order, where the submission is, to *A.* and *B.* and such third person as they shall appoint; to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not enough to put in an award executed by all the three, reciting that *A.* and *B.* did appoint *C.*, and to prove that *C.* acted along with them in the arbitration. *Still and another v. Halford*, 4 Camp. 17.

Assignment.

55. Where a lease under seal has been assigned by deed as against the assignor, proof of the assignment establishes the original deed, since it is thereby adopted. *Nash v. Turner*, 1 Esp. N. P. C. 217.

Attorney.

56. An averment that the defendant is an attorney of a particular court, is not proved by the production of his bill of fees for business done in that court. *Green v. Jackson, Peake*, 236.

57. The book from the master's office in the court of K. B. is admissible to prove a person one of the attorneys of that court. *Rex v. Crossley*, 2 Esp. C. 526.

Attorney's Bill.

58. In an action on an attorney's bill, the plaintiff cannot give parol evidence of the contents of the bill delivered, without a notice to produce it; but a copy made at the same time with the bill delivered is good evidence, without such notice. *Philpson v. Chase*, 2 Camp. 110.

59. In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what should appear to be due, and the master's *allocatur* thereupon. *Lee v. Jones*, 2 Camp. 496.

Bail.

60. To prove that a party was bail to the action, the rule for the allowance of bail must be produced. *Piesley v. Von Esch*, 2 Esp. C. 605.

Bailment.

61. In an action for not taking proper care of a hired horse whereby his knees were broken, the plaintiff must give some positive evidence of negligence; and it is not enough to prove that the animal was returned by the defendant with his knees broken, although he had often been let out to hire before without having fallen down. *Cooper v. Barton*, 3 Camp. 5.

Bankrupt.

62. To establish an act of bankruptcy by an absconding to avoid creditors, it is sufficient proof that the bankrupt declared he secreted himself to avoid writs out against him, without actual proof of those writs. *Wilson and another v. Norman*, 1 Esp. C. 334.

63. Where a trader orders himself to be denied, and he is accordingly denied to several who call, the jury may presume that they were creditors, so as to establish an act of bankruptcy. *Jameson v. Eamer and another*, 1 Esp. C. 381.

64. Declaration of the bankrupt at the time of the act charged as an act of bankruptcy, are admissible as to the *quo animo*; but not those

those made subsequent to it. *Robson and another v. Kemp and another*, 4 Esp. C. 233.

65. As against the bankrupt the day mentioned in the proceedings as that on which the act of bankruptcy was committed, is evidence. *Pearson v. Fletcher*, 5 Esp. C. 91.

66. In an action by the assignees of a bankrupt, entries made by the bankrupt in his books before the act of bankruptcy are good evidence to prove the petitioning creditor's debt. *Watts v. Thorpe*, 1 Camp. 376.

67. In an action against the sheriff for a false return to a writ of *fi. fa.*; where the defence rests upon the validity of a commission of bankruptcy, if it appears that the assignees are the real parties, a declaration by one of them who was the petitioning creditor, made subsequently to the suing out of the commission, that the bankrupt did not owe him 100l, is admissible evidence on the part of the plaintiff. *Dowden v. Fowle, Esq.*, 4 Camp. 38.

68. Where the petitioning creditor's debt, set up to support a commission of bankruptcy, is a bill of exchange drawn by the bankrupt and indorsed to the petitioning creditor, evidence must be adduced that it was so indorsed before the suing out of the commission. *Rose and another v. Rowcroft*, 4 Camp. 245.

69. It is competent to the assignees of a bankrupt, upon the trial, to repudiate an insufficient act on which the commission is founded, and resort to a better. *Reed and another v. James*, 1 Starkie, 136.

70. The date upon a promissory-note made by a bankrupt, is *primd facie* evidence to show that the note existed before the act of bankruptcy was committed, so as to establish a petitioning creditor's debt in an action by the assignees. But no declaration by the bankrupt, whether oral or written, subsequent to his bankruptcy, would be admissible in evidence to prove this. *Taylor and others v. Kinloch*, 1 Starkie, 175.

71. In an action by the assignees of a bankrupt, where no notice has been given to dispute the bankruptcy, a deposition, stating that the bankrupt absented himself, and that the bankrupt had admitted that he absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not *primd facie* evidence to prove the act of bankruptcy. *Marsh and another v. Meager*, 1 Starkie, 353.

72. It is competent to a defendant to impeach the title of a bankrupt in an action by the assignees, although he himself claims title under the bankrupt. *Taylor and others v. Kinloch*, 1 Starkie, 175.

73. *Assumpsit*,—plea in abatement, that *A.* and *B.*, the assignees of *C.*, a bankrupt, ought to have been joined as co-defendants; it is not sufficient for the defendant to prove that *A.* and *B.* acted as assignees; he must prove that they were so, either by the production of the assignment, or by proving the admission of the plaintiff to that effect. *Pasmore v. Bousfield*, 1 Starkie, 296.

74. Debt on bond by the plaintiffs as assignees of a bankrupt,—plea, payment; it is not incumbent on the plaintiffs to prove themselves to be assignees. *Corsbie v. Oliver*, 1 Starkie, 76.

75. A declaration or advertisement by an auctioneer, that the property he is selling belongs to *B.*, a bankrupt, is an admission that he is acting under the assignees, and sufficient proof of their title, &c. in an action against him for the produce. *Maltby v. Christie*, 1 Esp. C. 340.

76. In actions by assignees of bankrupts, to which the general  
issue

issue was pleaded before the passing of Sir S. Romilly's act 49 G. 3. c. 131., the proceedings under the commission are sufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt. *Willock v. Smith*, 2 Camp. 184.

77. In an action by the assignees of a bankrupt, the notice under 49 G. 3. c. 121. s. 10., that the defendant means to dispute the validity of the commission, is not to be considered as part of the defendant's regular evidence in the cause, but may be proved at the beginning of the trial, and immediately puts the plaintiffs upon strict proof of the trading, petitioning creditor's debt, and act of bankruptcy. *Decharme v. Lane*, 2 Camp. 324.

78. Although in an action by the assignees of a bankrupt, the defendant has once pleaded, without giving notice under 49 G. 3. c. 121. s. 10., which the statute requires to be given, "at or before the time of his pleading," yet if he has leave to withdraw his plea, and plead *de novo*, such a notice given with the second plea is sufficient. 2 Camp. 325.

79. In an action by the assignees of a bankrupt, if no notice be given under 49 Geo. 3. c. 131., that the validity of the commission is disputed, the petitioning creditor's debt is sufficiently proved by the deposition of the petitioning creditor himself before the commissioners. *Bisse v. Randall*, 2 Camp. 493.

80. To render the proceedings under a commission of bankrupt evidence, pursuant to Sir S. Romilly's act, it is enough to show that they are produced from the custody of the solicitor to the commission, or to prove the handwriting of one of the commissioners before whom they are taken. *Collinson v. Hillear*, 3 Camp. 30.

81. In an action of trespass, brought by a bankrupt against his assignees, to try the validity of the commission, although they are not named as assignees on the record, if he does not give any notice under Sir Samuel Romilly's act, 49 G. 3. c. 121. s. 10., the commission, and the proceedings under it, are sufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt. *Simmonds v. Knight and another*, 3 Camp. 251.

82. In an action by a bankrupt against his assignees, to try the validity of the commission, if there be no notice under Sir S. Romilly's act, the proceedings are only *prima facie* evidence for the defendant, and the plaintiff may call witnesses to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy. *Ellis v. Shirley*, 3 Camp. 424.

83. In an action against the assignees of a bankrupt, a notice to dispute the bankruptcy, served at the same time when the issue is delivered, with notice of trial on the back of it, is not sufficient under 49 G. 3. c. 121. s. 10. *Richmond v. Heapy and another*, 4 Camp. 207.

84. A defendant, in an action by the assignees of a bankrupt, pleads the general issue, without giving notice of his intention to dispute the bankruptcy; but, before the time for pleading expires, delivers the general issue again with notice; such notice is insufficient. *Poolc v. Bell and another*, 1 Starkie, 328.

85. Where no notice has been given to dispute the bankruptcy, in an action by the assignees, it ought to appear from the deposition, that the petitioning creditor's debt was due at the time of the act of bankruptcy. *Lawson and others v. Robinson*, 1 Starkie, 456.

86. In an action against the assignees of a bankrupt and their servants, the proceedings may be read in evidence, where no notice has

has been given under the statute of the plaintiff's intention to dispute the bankruptcy, although there are other defendants on the record besides the assignees. *Gillman v. Cousins and others*, 2 Starkie, 182.

87. In an action by the assignees of a bankrupt where the proceedings under the commission are read by virtue of the statute, a deposition, in which it is stated that the deponent saw the bankrupt execute an assignment of all his effects, &c. is sufficient evidence of act of bankruptcy, without producing the assignment. *Kay and another v. Stead*, 2 Starkie, 200.

88. Notwithstanding there has been no notice to dispute the commission, act of bankruptcy, &c. under the 46 G. 3. c. 135. s. 10., the proceedings are *not* conclusive evidence of the facts therein stated; but the court is still to form a judgment upon them, whether they prove an act of bankruptcy or not. *Brown and another v. Forrestall and another*, 1 Holt, 190.

89. The petitioning creditor's debt, trading, and act of bankruptcy, are sufficiently proved by the production of the commission, and the proceedings under it, in a case where the defendant is not named as assignee on the record, provided no notice under Sir S. Romilly's act, 49 G. 3. c. 121. s. 10., has been given by the plaintiff. *Row v. Lant*, 1 Gow, 24.

90. In an action by the assignees of a bankrupt, it is not sufficient proof of a set-off that the commissioners permitted the defendant to prove the debt proposed to be set off under the commission. *Pirie and another v. Mennett*, 3 Camp. 279.

91. In order to make the assignees of a bankrupt liable for money had and received by the bankrupt for a specific purpose, it is necessary to prove that the money came into their hands with a knowledge of the purposes for which it was destined. *Kieran v. Johnson and another*, 1 Starkie, 109.

92. In an action by a bankrupt against his assignees, to try the validity of the commission, where notice being given only to dispute the act of bankruptcy, the defendants read the two depositions on the file of the proceedings, which prove the trading and petitioning creditor's debt; the residue of the proceedings are not to be considered in evidence, and the plaintiff's counsel has no right to inspect them. *Bluck v. Thorne and another*, 4 Camp. 191.

93. In an action by the assignee of a bankrupt, claiming property which the bankrupt is alleged to have had in his possession, order, and disposition, as the reputed owner at the time of his bankruptcy, it is competent for the defendant, who has paid a valid consideration for the property, to give evidence of a contrary reputation, and to resist the claim of the plaintiff under the statute 21 Jac. 1. c. 19. s. 11., upon those grounds. *Gurr v. Rutton*, 1 Holt, 327.

94. *A.* takes *B.*'s goods in execution, after an act of bankruptcy committed by *B.*, and assigns them to *C.*; *A.*'s examination, taken under the commission, subsequently to the assignment, cannot be read in an action by the assignees against *C.*, in order to show *A.*'s knowledge of *B.*'s insolvency at the time of the execution. But, *semble*, an examination previously to the assignment would have been admissible. In such a case, the question is not whether *C.* knew, but whether *A.* knew that *B.* was insolvent. *Deady and another v. Harrison*, 1 Starkie, 60.

95. To prove the allowance of a bankrupt's certificate by the lord chancellor, the book kept in the office of the secretary of bankrupts in which entries are made of the allowance of certificates, is not secondary evidence. *Henry v. Leigh*, 3 Camp. 499.

96. An admission by the petitioning creditor against the sufficiency of his debt, is evidence in avoidance of the commission, in a suit between third persons. *Young and another v. Smith and another*, 6 Esp. C. 121.

97. If the fraud by which the plaintiff seeks to invalidate the defendant's certificate is, that he allowed those who were not creditors to prove under the commission, the parties themselves must be called to prove the fact. *Edmonstone v. Webb*, 3 Esp. C. 264.

98. Where the defendant pleads his certificate in bar, the plaintiff is at liberty to give evidence of gaming at *Nisi Prius*, in order to vitiate the certificate. The 12th and 7th sections of the 5 G. 2. c. 30. are to be construed as if they were incorporated. But the plaintiff must confine his evidence to one act, and elect whether he will give evidence of one loss amounting to 5*l.*, or of several losses amounting to 100*l.* *Hughes v. Morley*, 1 Holt, 520.

99. To prove that the defendant who pleads his bankruptcy had been before discharged as a bankrupt; after notice to produce the former certificate, it is enough if witnesses state they were employed by him to solicit that certificate, and that, looking at the entries in their books, they have no doubt it was allowed by the lord chancellor. *Henry v. Leigh*, 3 Camp. 499.

100. Where, on the defendant pleading his bankruptcy, issue is joined on the fact, whether he has been discharged under a former commission, the plaintiff must show that the defendant obtained his certificate under that commission, either by the regular proof of it, or by secondary evidence after notice to produce it. Without such notice, the defendant's affidavit of conformity under the former commission was held insufficient. *Graham v. Grill*, 4 Camp. 282.

101. Where a defendant relies on a certificate, under a second commission of bankruptcy against him, under which he has not paid 15*s.* in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, the act of bankruptcy, and the other facts which are necessary to support the commission as against third persons. *Gregory v. Merton*, 3 Esp. C. 195.

102. If several are sued, and one pleads his bankruptcy, upon which the plaintiff enters a *nolle prosequi* as to him, he may still give evidence of the admissions of such defendant, made before he obtained a certificate. *Grant v. Jackson*, Peake, 203.

103. *Semble*, That an indictment against a bankrupt for perjury before the commissioners, in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy. *Rex v. Punshon*, 3 Camp. 96.

104. Although a person has been improperly examined before commissioners of bankrupt upon a subject unconnected with the interests of the bankrupt estate, with a view to procure evidence in an action depending against him, the examination may be used as evidence by the plaintiffs at the trial of the action, and the judge at *Nisi Prius* cannot inquire into the abuse of the authority of the great seal by which the examination was obtained. The remedy of a party so improperly examined, is by an application to the lord chancellor to have the examination taken off the file and cancelled. *Stockfleth v. De Tastet and others*, 4 Camp. 10.

105. To support a defence to an action of *assumpsit*, that the plaintiff was under coverture when the cause of action occurred, although she lived as a single woman, it is not enough to prove a  
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bare declaration by her, that she had been married to *J. S.*, who was still alive, without actual proof of the marriage or of cohabitation with her supposed husband; particularly if there appear any reason to doubt that the marriage was valid. *Wilson v. Mitchell*, 3 Camp. 393.

106. If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods; and in action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter. *Metcalf v. Shaw*, 3 Camp. 22.

107. Where the wife of the defendant alone transacts the business at home, and purchases all the articles used in their trade, her admission as to the state of the accounts between the plaintiff, who has supplied goods to her to be used in the trade, and her husband, is evidence against the latter. *Anderson v. Sanderson*, 2 Starkie, 204.

108. An admission by the wife, after marriage, respecting a demand against her while single, is inadmissible evidence against the husband. *Kelly and wife v. Small*, 2 Esp. C. 716.

109. In an action against a husband for necessities supplied to his wife, where the defence is a separate maintenance, the wife's receipts are no evidence to prove that the allowance has been paid. *Hodgkinson and another v. Fletcher*, 4 Camp. 70.

110. Where an action is brought by the orders of a wife in the name of her husband, to recover a sum of money taken from her on the ground that it was the produce of goods she had been concerned in stealing; what she afterwards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is evidence for the defendant. *Carey v. Adkins*, 4 Camp. 92.

111. In an action brought by the orders of a wife in the name of her husband, to recover a sum of money taken from her on the ground that it was the produce of goods she had been concerned in stealing; facts being proved to raise a reasonable suspicion that the money taken from the wife was the produce of stolen property: Held that evidence was necessary on the part of the plaintiff to show whence the money was derived, and that the wife was *bond fide* in possession of it for her husband. *Carey v. Adkins*, 4 Camp. 92.

112. If it appears that the plaintiff's demand arises on a promissory note, it must be produced, or shown to have been destroyed. *Dangerfield v. Wilby*, 4 Esp. C. 159. Bill of exchange.

113. In actions on bills of exchange, the bill must be produced at the trial, though at the suit of the party in whose hands it was dishonoured. *Powell v. Roach*, and another 6 Esp. C. 76.

114. An offer of indemnity against a lost bill or note, will not dispense with its production at the trial of an action thereon. *Pearson v. Hutchinson*, 6 Esp. C. 126.

115. In an action by the indorsee of a bill of exchange against the acceptor, it appeared that, after action brought and notice of trial, the bill, which was indorsed in blank, had been lost: *Held*, that although the bill had been drawn more than six years, the plaintiff was not entitled to recover without producing it at the trial. *Poole v. Smith*, 1 Holt, 144.

116. In an action by the indorsee against the maker of a note, an admission

admission by the indorser, that the indorsement was his hand-writing is evidence for the plaintiff. *Maddocks v. Hankey*, 2 Esp. C. 647.

117. An offer, after a bill or note has become due, to give the holder another bill in lieu of it, is an admission of the holder's title so as to supersede the necessity of proving the indorsements stated. *Bosanquet v. Anderson*, 6 Esp. C. 43.

118. Although a bill of exchange has been shown to the drawer, with the name of the payee indorsed upon it, and he merely objects to paying it, that he had drawn it without consideration, in an action against him by the indorsee, this does not dispense with regular proof of the indorsement. *Duncan v. Scott*, 1 Camp. 101.

119. Where, to an action at the suit of the indorsee against a maker of a promissory-note, the defence is, usury in its original concoction; letters from the payee to the maker, stating the consideration as between them, if shown to have been contemporaneous with the making of the note, are admissible evidence to prove the usury. *Kent v. Lowen*, 1 Camp. 180. d.

120. In an action against the indorser of a bill of exchange, it is not necessary to prove any indorsements on the bill prior to the defendant's. *Critchlow v. Parry*, 2 Camp. 182.

121. In an action against the drawer of a foreign bill of exchange, a promise of payment by the defendant after the bill was due, is sufficient evidence of a protest for non-payment and notice of the dishonour of the bill. *Gibson v. Coggon*, 2 Camp. 188.

122. In an action by bankers to recover the amount of a bill of exchange accepted by the defendant, payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee, as well as the acceptance by the defendant. *Forster v. Clements*, 2 Camp. 17.

123. Where several plaintiffs sue as indorsees of a bill of exchange, if the bill appears indorsed in blank, there is no necessity for their proving that they were in partnership together, or that the bill was indorsed and delivered to them jointly. *Ord and others v. Portal*, 3 Camp. 239.

124. *B.* being liable to *A.* upon a bill of exchange accepted by him for the accommodation of *C.*, promises *A.* to indorse another bill in lieu of this, which was to be drawn by *D.* upon *E.*, and delivered by *C.* to *A.*; *C.* delivers *A.* a bill drawn by *D.* upon *E.*, and purporting to be indorsed by *B.*, and *A.* delivers up the former bill: in an action at the suit of *A.* against *B.* on the substituted bill, the latter is not precluded from showing that the indorsement is a forgery. *Moxon and others v. Pulling and others*, 4 Camp. 54.

125. A promise to pay a foreign bill of exchange made after it is due, is evidence to support the allegations in the declaration, of a due presentment for payment, of a protest, and of regular notice to the defendant. *Greenway and others v. Hindley and another*, 4 Camp. 52.

126. A notarial protest under seal, is no evidence that a foreign bill of exchange has been presented for payment in *England*. *Chesmer v. Noyes*, 4 Camp. 129.

127. In an action against the acceptor of a bill of exchange payable after sight, if the defendant's signature as acceptor is proved, the date of the acceptance appearing over it, although in a different hand-writing, will be presumed to have been written by his authority. *Glossop v. Jacob*, 4 Camp. 227.

128. To prove that a bill of exchange, purporting to be drawn abroad

abroad, was in point of fact drawn in England, and is therefore void for want of a stamp, it is not sufficient barely to shew that the drawer was in England at the time the bill bears date. *Abraham v. Du Bois*, 4 Camp. 269.

129. The maker of a promissory-note, whose signature has been proved in an action by the payee, cannot insist upon indorsements being read, which are not a part of the note. *Stone v. Metcalf*, 1 Starkie, 53.

130. Where a foreign bill is payable at a certain time after sight, and upon the production of the bill, an acceptance appears to have been written by the defendant, under a date which is not in his hand-writing, the date is evidence of the time of acceptance, because it is the usual course of business, in such cases, for a clerk to write the date, and for the party to write his acceptance under the date. *Glossop v. Jacob*, 1 Starkie, 69.

131. A letter written by the indorser of a bill of exchange to a subsequent holder, offering to give a substituted bill in place of that which he had indorsed, supersedes the necessity of proving the intermediate indorsements stated in the declaration. *Sidford and another v. Chambers*, 1 Starkie, 326.

132. Two plaintiffs who sue as the indorsees of a bill of exchange indorsed in blank, are not bound to prove any partnership. *Rodasny and another v. Leach*, 1 Starkie, 446.

133. In an action by a second indorsee against the drawer of a bill of exchange, payable to his own order, proof that the bill purported to have been accepted when it was indorsed to the plaintiff, does not supersede the necessity of proving an actual acceptance. The plaintiff, in such case, must either allege and prove an actual acceptance, or charge the drawer with having drawn the bill upon a non-existing person. *Smith v. Bellamy*, 2 Starkie, 223.

134. The indorsee of a bill in an action against the acceptor, alleges, that the bill was directed to the defendant; this allegation is not supported by proof that the drawer drew the bill payable to his own order, at a specified place, although the defendant, when it was presented there, wrote his name upon it as the acceptor. *Gray v. Milner*, 2 Starkie, 336.

135. In an action against the payee of a promissory-note, who was likewise the indorser; held, that his indorsement was an admission of the hand-writing of the maker. *Free v. Hawkins*, 1 Holt, 550.

136. In an action by the indorsee against the drawer of a bill of exchange, if it appears that the defendant drew the bill, without consideration, and under duress, it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it became due. *Duncan v. Scott*, 1 Camp. 100.

137. In an action by the indorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it. *Rees v. Marquis of Headford*, 2 Camp. 574.

138. In an action on a bill of exchange, the plaintiff cannot be compelled to prove what consideration he gave for it, by a mere notice that he will be required so to do. 2 Camp. 596.

139. To render the drawer liable as for non-acceptance, it must be proved that the person to whom the bill was presented, was the drawee. *Cheek v. Roper*, 5 Esp. C. 175.

140. Leaving a letter communicating the dishonour of a bill at the house where the party lodges with one who says that he is not at



home, is presumptive proof that the letter reached him. *Stedman v. Gooch*, 1 Esp. N. P. C. 5.

141. In an action against the indorser of a promissory-note, or bill of exchange, it is sufficient evidence of presentment for payment and notice of dishonour, that the defendant promised absolutely to pay the note or bill after it was due. *Taylor v. Jones*, 2 Camp. 105.

142. But if the drawer (or indorser) after being arrested, without acknowledging his liability, merely offers to give a bill, by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice. *Cumming v. French*, 2 Camp. 106.

143. In an action against the maker of a promissory-note, payable at a banking house, it is but necessary to prove that he had notice of its dishonour. *Pearse v. Pemberthy and others*, 3 Camp. 261.

144. In an action by the indorsee against an indorser of a bill of exchange, a witness states, that either two or three days after the dishonour of the bill, notice was given by letter to the defendant;—notice in two days being in time, but notice on the third too late;—it cannot be left as a question for the jury, whether notice was given in time, although the defendant has had notice to produce the letter which would ascertain the time. *Lawson and another v. Sherwood*, 1 Starkie, 314.

145. Where a party to a bill discharged by laches revives his liability by a new promise, in an action against him, a demand on the acceptor as well as the promise must be proved. *Brown v. McDermot*, 5 Esp. C. 265.

146. The production of a bill of exchange from the custody of the acceptor, is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted.—Nor is payment to be presumed from a receipt indorsed on the bill, unless this receipt is shewn to be in the hand-writing of a person entitled to demand payment. *Pfiel v. Van Batenberg*, 2 Camp. 439.

147. In an action by the payee of a bill of exchange accepted by the defendant for a valuable consideration, evidence that the plaintiff had been discharged as an insolvent debtor after the bill became due, and had given in a blank schedule, is not enough to shew that the bill had been satisfied. *Hart v. Harman*, 3 Camp. 13.

148. In an action by the indorsee of a bill of exchange, though it appears that the plaintiff, in discounting it, required the indorser to take part in goods; still, if the latter voluntarily acceded to that proposal as advantageous to him, the plaintiff is not bound to prove that the goods were of the estimated value, and the burthen of proof lies upon the defendant if he would impeach the transaction as usurious. *Coombe v. Miles*, 2 Camp. 553.

149. In an action on a bill of exchange, if it appear that the plaintiff discounted it for the defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff, to prove, that the goods were of the value at which they were estimated, for the purpose of rebutting the presumption that the transaction was usurious. *Davis v. Hardacre*, 2 Camp. 574.

150. Action by the indorsee against the acceptor of a note, the date of which appears to have been altered by the acceptor, it lies on the plaintiff to shew that the alteration was made previous to the indorsement of the note by the drawer, to whose order it was made payable. *Johnson and others v. the Duke of Marlborough*, 2 Starkie, 313.

151. Notice

151. Notice having been given in an action on a bill of exchange, that the want of consideration will be set up as a defence, it is not competent to the plaintiff, after he has closed his case, to go into evidence of consideration in reply to the defendant's case. *Delauney v. Mitchell*, 1 Starkie, 439.

152. A general receipt on the book of a bill of exchange is *prima facie* evidence of its having been paid by the acceptor, and will not, of itself, be evidence of a payment by the drawer, though it is produced by him. *Scholey v. Walsby*, Peake, 25.

153. In an action against the maker of a note indorsed to the plaintiff after it became due, the indorser's letters are not evidence to impeach the transaction under which the plaintiff became proprietor. *Clipsam v. O'Brien*, 1 Esp. N. P. C. 10.

154. If a bill of particulars consists of two items, and the plaintiff at the trial proves one only, he cannot apply money paid into court generally, and which only covers the demand proved, to the other. *Holland v. Hopkins*, 3 Esp. C. 168. Bill of particulars.

155. In an action of debt on bond, an admission of the handwriting of the attesting witnesses, presumptively admits the delivery of the bond as the defendant's deed. *Milward v. Temple*, 1 Camp. 375. Bond.

156. On *non est factum* pleaded to a bond, it is not sufficient to prove the execution by a person who executed in the name of the defendant without proof of identity. *Parkins v. Hawkshaw*, 2 Starkie, 239.

157. To raise the presumption that a bond has been satisfied, there must be a lapse of the full period of 20 years from its becoming forfeited; unless there be some additional circumstance, as an intermediate settlement of accounts between the parties. *Colsel v. Budd*, 1 Camp. 27.

158. Indorsements on a bond acknowledging the receipt of interest on payment of part of the principle, are not evidence against the obligor to prove that the bond was on foot, without shewing that they were on the bond recently after their dates, and at a time when their purport was contrary to the interest of the obligee. *Rose v. Bryant*, 2 Camp. 321.

159. Payment of money secured by bond, is not to be presumed, although more than 20 years have elapsed since an acknowledgement that any sum was due upon it, if the obligee ever since that acknowledgement has resided abroad. *Newman v. Newman*, 1 Starkie, 101.

160. A carrier's receipt for goods, is evidence of the contract between himself and the owner. *Samuel v. Darch*, 2 Starkie, 60. Carrier.

161. In assumpsit against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents. *Jolley v. Taylor*, 1 Camp. 143.

162. Where an accident happens to a stage-coach carrying more passengers than is allowed, it shall be ascribed to that cause. *Israel v. Clark and another*, 4 Esp. C. 259.

163. Where an accident happens by the breaking down of a stage-coach, the owners when sued must prove that it was of the requisite strength, notwithstanding there were no more passengers than the allowed number. *Israel v. Clark and another*, 4 Esp. C. 259.

164. In an action against the proprietor of a stage-coach for negligence, whereby the coach broke down, and the plaintiff travelling

by it as a passenger, was hurt; to prove negligence, it is *prima facie* enough to give evidence of the coach having broke down; from which negligence will be inferred. *Christie v. Grygs*, 2 Campbell, 79.

165. In an action against a carrier for negligence, the defendant cannot read in evidence an advertisement in a newspaper, by which he limits his responsibility, unless he first proved that the plaintiff was in the habit of reading that paper. But *semble* an advertisement in the gazette may be read without such preparatory proof; though without it the evidence is weak. *Leeson v. Holt and others*, 1 Starkie, 186.

166. In order to affect one who sends goods by a carrier with notice of the terms on which he deals, it is not sufficient to shew that a printed notice was exhibited in the carrier's office where the goods were delivered by a porter, although the porter could read and had seen the notice if in fact he had never read it. *Kerr v. Willan*, 2 Starkie, 53.

167. In an action against the owner of a chartered vessel for negligence, in consequence of which the plaintiff's goods were lost, the non-arrival of the vessel at her destined port is not even *prima facie* evidence of negligence. *Boyson v. Wilson*, 1 Starkie, 236.

168. In an action against the master of a vessel for not safely conveying goods to a foreign port, consigned to the plaintiffs, evidence that the goods were seized in another foreign port by the government, coupled with a letter of the defendants, in which he acknowledges that he is accountable for the goods, is sufficient to warrant the jury in finding for the plaintiffs without any further proof of the cause of seizure. *Variance, Cullen and another v. M'Alpine*, 2 Starkie, 552.

169. If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough to make the owners liable for the non-delivery of goods, to shew that they were put on board the ship to be carried in this voyage, unless it be proved that they were received on board by some person appointed or authorized by the owners. *Mackenzie v. Rowe*, 2 Camp. 482.

170. The entry in the office at Somerset House for licensing stage-coaches is no evidence to prove that the persons named in the licence are owners of the coach. *Strother v. Willan and another*, 4 Campbell, 24.

Character.

171. The general rule is, that where a particular fraud is imputed to a party, general evidence to character is inadmissible. *Secus*, where general character is put in issue. *Farro v. Hicks*, 4 Esp. C. 51.

172. The prosecutrix of an indictment for an assault with intent to commit a rape having been cross examined as to crimes committed by her several years before the alleged offence, evidence may be adduced to shew that her character has since been good. The fact of her making complaint of the outrage, and the state in which she was at the time of making the complaint, are evidence, although the particulars of her statement are not evidence to prove the truth of her statement. The defendant may impeach her character for chastity by general, but not by particular evidence. *Rex v. Clarke*, 2 Stark. 241.

173. When a witness's character is attacked in a court of justice, the questions should be confined to his general conduct, and should not point at specific charges. *Sharp v. Scoging*, 1 Holt, 541.

Coals.

174. In an action for a penalty against the master of a vessel, for the

the delivery of a ticket before the arrival of the vessel, the copy of the certificate delivered to the clerk of the market, describing the defendant as master of the vessel, is not sufficient evidence to prove a sending by the defendant. But *semble*, a sending by him would be presumed on proper proof that he was master of the vessel. *Allred v. Halliwell*, 1 Starkie, 117.

175. Depositions taken under an old commission are evidence without producing the commission itself, since it may be presumed to be lost. *Secus*, where the commission is recent. *Bayley and another v. Wylie*, 6 Esp. C. 85. Commis ion.

176. In an indictment for a conspiracy, evidence may be given of its character and extent without first fixing the defendants. *Rex v. Hammond and another*, 3 Esp. C. 719. Conspiracy.

177. In an indictment for a conspiracy, after having fixed the defendants with a joint design, the expressions of one, used even on another occasion, relative to that design, are evidence against all. *Rex v. Salter and another*, 5 Esp. C. 125.

178. To prove the election of a constable for a ward, the ward-note-book must be produced; the production from the proper custody of a list of persons sworn in to serve, is insufficient. *Underhill v. Witts*, 3 Esp. C. 56. Constable.

179. In an action on a contract against several, it must be proved to be the contract of all against those who dispute it, notwithstanding some have on the record acknowledged themselves parties. *Gray and another v. Palmers and another*, 1 Esp. N. P. C. 135. Contract.

180. An agreement to employ the plaintiff in a particular situation cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only. *Chiodi v. Waters*, 1 Starkie, 335.

181. The official letter of the commander of a convoy, to the admiralty, at the end of the voyage, seems good evidence of the facts therein stated respecting the ships under convoy. *Watson and Wife v. King*, 4 Campbell, 275. Convoy.

182. A written notice may be proved by a duplicate original. *Gotlib v. Danvers*, 1 Esp. C. 455.

183. In an action on an attorney's bill, though the plaintiff cannot produce parol evidence of the contents of the bill delivered, without giving notice to produce it, yet a copy made out at the same time, and proved to be correct, is sufficient evidence. *Anderson v. May*, 3 Esp. C. 167, S. C. 2 B. and P. 237. Copy.

184. A written notice may be proved by a duplicate original. *Surtees Law v. Hubbard*, 4 Esp. C. 203.

185. A copy of a letter containing notice that a bill has been dishonoured is not admissible as evidence of the fact without notice to produce the original. *Langdon v. Hulls*, 5 Esp. C. 156.

186. The duplicate of a writing taken from the autograph at one impression by means of a copying machine, cannot be read in evidence as an original. *Modin v. Murray*, 3 Campbell, 228.

187. Where there is a partnership constituted by deed, a notice that it is dissolved, signed by the parties, for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution for all purposes against the parties signing it. *Doe ex dem. Waithman and others v. Miles*, 4 Campbell, 373, S. C. 1 Starkie, 181.

188. *Semble*, that proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the defendant upon the dishonour of a bill, together with proof of notice to produce

duce the letter so delivered, as containing notice of dishonour, is evidence (on default of production) that the defendant had notice. *Roberts v. Bradshaw*, 1 Starkie, 28.

189. A copy of a letter containing notice of the dishonour of a bill is admissible without notice to produce the original. *Roberts v. Bradshaw*, 1 Starkie, 28.

190. If a copy of any document, which itself is not evidence at common law, be made evidence by act of parliament, a copy must be produced, and the original is not made admissible evidence by implication. *Burdon v. Rickets*, 2 Camp. 121. n.

191. On a trial at law, an examined copy of the plaintiff's answer to a bill in equity may be read in evidence against him, without producing the original. *Hodgkinson v. Willis*, 3 Campbell, 401.

192. The memorial of a registered conveyance, the original being in the defendant's possession, is not evidence for the plaintiff unless notice has been given to produce the original. *Molton v. Harris*, 2 Esp. C. 549.

193. Examined copies of entries in the Bank books are good evidence to prove the transfer of stock. *Marsh v. Collnett*, 2 Esp. C. 665.

194. An examined copy of entries in the court rolls of a manor, is evidence. *Doe ex dem. Churchwardens of Croydon, v. Cook*, 5 Esp. C. 221.

195. Where, by the laws of a foreign country, as of *France*, the original bill of the sale of a ship is deposited with a public officer, and a notarial copy given to the vendee, such copy is evidence here of ownership. *Woodward v. Larking*, 3 Esp. C. 288.

196. A copy of a judgment in the supreme court of *Jamaica*, made by the chief clerk of the court, is not receivable evidence here, although it appears that such copies are usually received as evidence in the island of *Jamaica*. *Appleton v. Lord Braybrook*, 2 Starkie, 6.

197. It is sufficient proof of the copy of a record that the original was read to the witness, and that the copy agreed. *M'Neil v. Perchard and another*, 1 Esp. C. 263.

198. To prove an examined copy of an *Irish* judgment, it is *not* enough for the witness to say that he examined the copy with a record produced to him in the room over the Four Courts at *Dublin*, where the records of the superior *Irish* courts are kept, without seeing whence the record in question was taken, or knowing the person who produced it to be an officer of the court. *Adamthwaite v. Synge*, 4 Campbell, 372. S. C. 1 Starkie, 183.

Copy-right.

199. Evidence that the plaintiff in an action for pirating a musical work acquiesced in the defendant's publication of it six years ago, does not prove that the plaintiff has transferred his interest in the copy-right. A receipt given by the plaintiff for money received by him as the price of the copy-right will not preclude the plaintiff from maintaining the action. *Latour v. Bland and another*, 2 Stark. 382.

Corporation.

200. The seal of a corporate body ought to be proved by a witness acquainted with their impression. *Dr. Moises v. Dr. Thornton*, 3 Esp. C. 4. S. C. 8 T. R. 303.

201. It is not necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness who saw the seal affixed to the identical instrument; but when an instrument purports to be under the seal of a corporation, it will be sufficient to show, that the seal is the official seal of the corporate

corporate body. *Dr. Moises v. Dr. Thornton*, 3 Esp. C. 4. ; S. C. 8 T. R. 303.

202. The counterpart of a lease, purporting to have been executed by a lessee, of a lease granted by the mortgagor in conjunction with the mortgagee of certain premises, cannot be read in evidence as against one who derives title under the mortgagee, without some evidence of the execution of the original lease (which has been lost) by the mortgagee. But proof that the original lease was signed by the mortgagee, the subscribing witnesses not being known, would be sufficient to warrant the reading of the counterpart. *Doe ex dem. Clark v. Trapand*, 1 Starkie, 281. Counterpart.

203. In an action on a covenant by the defendant, to pay the amount of all bills drawn by him and accepted by the plaintiff, it is sufficient for the latter to produce the bills drawn by the defendant, without going on to prove payment of such bills. *Gibbon and others v. Featherstonhaugh*, 1 Starkie, 225. Covenant.

204. The custom house copy of the searcher's report of the cargo, is evidence. *Johnson v. Ward*, 6 Esp. C. 47. Custom house.

205. A shipping entry at the custom house, although to some purposes a public document, is not evidence to affect the person (whose duty it was to cause the entry to be made) criminally; the materials from which the entry was made by the proper officer having been accidentally destroyed. *Hughes v. Wilson*, 1 Starkie, 179.

206. A plaintiff, in an action of trespass for breaking and entering his house, may give in evidence a consequential injury to his wife, not as a substantive ground of action, but to show how violent the defendant's conduct was. *Huxley v. Berg and others*, 1 Starkie, 98. Damages.

207. In an action against the captain of an East Indiaman for assaulting a gunner's mate aboard the ship, and causing him to be flogged, it is not competent to the plaintiff to give evidence as to his family and connections, unless they were known to the defendant at the time. *Rhodes v. Leach*, 2 Starkie, 516.

208. The production of letters of administration is not of itself proof that the party is dead. *Thompson v. Donaldson*, 3 Esp. C. 63. Death.

209. If the defendant's hand-writing to a deed is proved, the jury may presume the sealing and delivery. *Grellier v. Neale, Peake*, 116. Deed.

210. If in debt on bond, the defendant sets out the condition on oyer, which appears to be for the performance of covenants in a deed, there is afterwards judgment on *demurrer* for the plaintiff, the execution of the deed need not be proved on the writ of inquiry. *Collins v. Rybot*, 1 Esp. N. P. C. 157.

211. The rule that a deed of thirty years old may be read without proof of exemption is without exception, but has this limitation, that where relative to land, possession has accompanied it; where in gross, that it has come out of the proper custody. *The Corporation of Chelsea Waterworks v. Cowper*, 1 Esp. C. 275.

212. Where to excuse the profert of a deed it is averred to have been lost or mislaid, and the averment traversed, it must be proved that a search was made where the deed was most likely to be found. *Beckford v. Jackson*, 1 Esp. C. 337.

213. A deed of thirty years old may be read without proof, though the subscribing witness is in court. *Anon.* 2 Esp. C. 666.

214. A deed alleged in a plea to be lost by time and accident,  
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may be given in evidence, if, having been lost at the time of pleading, it is found before trial. *Hawley v. Peacock*, 2 Camp. 557.

215. Where issue is joined on *non est factum*, some evidence must be given of the identity of the party executing the deed, which is not to be presumed from its having been executed by a person in his name in the presence of the attesting witness, who was unacquainted with him. *Middleton v. Sandford*, 4 Camp. 34.

216. If a bond be declared upon as the joint bond of the defendant and two other persons, and the defendant pleads that it is not his deed, at the trial it is only necessary to prove that the bond was executed by the defendant. *Middleton v. Sandford*, 4 Camp. 34.

#### Demand.

217. Where to debt on bond conditioned for the payment of a sum of money *on demand*, the defendant pleads that no demand was made, upon which issue is joined, the plaintiff must prove an express demand before action brought. *Carter v. Ring*, 3 Camp. 459.

#### Depositions.

218. If the material parts only of an examination are taken down, and they are afterwards read over to the party, admitted by him to be true, and signed, they are evidence against him. *Milward v. Forbes*, 4 Esp. C. 172.

219. The deposition of a witness taken down at the trial is evidence against him, though the examination was stopped short, and so the witness prevented explaining himself, as he might possibly have done. *Collett v. Lord Keith*, 4 Esp. C. 212.

220. If a witness who has been examined in a former action between the same parties, and where the point in issue is the same as in the second action, is since dead, what he swore at the trial may be proved by one who heard him give evidence. *Strutt v. Barrington and others*, 5 Esp. C. 56.

221. A party making use of interrogatories on which a witness has been examined, if he afterwards wishes to abandon a particular interrogatory, must abandon all. *Wheeler v. Atkins*, 5 Esp. C. 246.

222. The depositions, taken (under an order) in an insurance cause, of the captain, who is a part-owner, and to whose deviation the defendant ascribes the loss, are inadmissible for the plaintiff. *Taylor v. McVicar*, 6 Esp. C. 27.

223. Depositions taken under a commission may be read without proof of the bill and answer. *Bayley and another v. Wylie*, 6 Esp. C. 85.

224. The depositions of a witness about to sail, examined on interrogatories under an order, and who has sailed on the voyage, may be read, though he has since put back from foul weather. *Fonsick v. Agar and others*, 6 Esp. C. 92.

225. A copy of depositions sworn at a judge's chambers, delivered out by his clerk, and attested by his signature, is admissible evidence, without proof of its having been examined with the original. *Duncan v. Scott*, 1 Camp. 101.

226. If a witness, examined upon interrogatories, refers to a writing, itself not evidence, as containing a statement of the facts to which he is interrogated, this writing may be read as part of his deposition. *Falconer v. Hanson*, 1 Camp. 171.

227. What is sufficient evidence of a witness being abroad, to let in his examination upon interrogatories? 1 Camp. 172.

228. Upon the trial of an ejectment respecting *black acre*, between *A. and B.*, in which it was necessary for *A.* to prove that he was the legitimate son of *J. S.*; *A.*, after proving by other evidence that *J. S.* was his reputed father, offered to give in evidence a deposition  
made

made by *J. S.* in a cause in chancery, instituted by *A.* against *C. D.* in order to perpetuate testimony to the alleged fact disputed by *C. D.*, that he was the legitimate son of *J. S.*, in which character he claimed an estate in remainder in *white acre*, which was also claimed in remainder by *C. D.* *B.* the defendant in the ejectment did not claim *black acre* under either *A.* or *C. D.*, the plaintiff and defendant in the chancery suit. Held by the judges (*Graham B.* dissentient) that according to law, the deposition of *J. S.* could not be received upon the trial of such ejectment against *B.*, as evidence of declarations of *J. S.*, the alleged father in matter of pedigree. *Berkeley Peerage Case*, 4 Camp. 401.

229. In order to warrant the admission of a deposition of the deceased against the prisoner on an indictment for murder, it is not necessary that the prisoner should have been present the whole of the time during which the deposition was taken, the deponent having been re-sworn in the presence of the prisoner, and the part of the deposition which had already been taken, having been read over to the prisoner, and sworn by the deponent to be true. *Rex v. Smith*, 2 Starkie, 208.

230. Where a witness is examined on interrogatories by the plaintiff, and cross interrogatories on the part of the defendant, although it should appear, when his evidence is read at the trial, that he was an interested witness, and ought to have been released; his evidence notwithstanding may be read, without proving him to have been released previous to such examination. The objection is too late at the trial; and should have been made at the time he was examined. *Ogle v. Paleski*, 1 Holt, 465.

231. In a trial for murder, the deposition of the deceased should be taken in the presence of the prisoner; but if such deposition be taken in the absence of the prisoner, and afterwards be read over to the deceased in the presence of the prisoner, and the deceased assents to the truth of it, this will make the deposition evidence against the prisoner. *Rex v. Smith*. 1 Holt, 614.

232. It seems that an ecclesiastical sentence of divorce *a mensa et toro*, is sufficient evidence of a separation without proof of the libel and other proceedings. *Stedman v. Gooch*, 1 Esp. N. P. C. 6.

233. Whether a declaration made by a person in *articulo mortis*, be receivable or not in evidence, is a question for the court. *Rex v. Hucks*, 1 Starkie, 521.

234. The practice of the ecclesiastical court is matter of fact to be proved by evidence, and left to the jury. *Beaurain v. Sir W. Scott*, 3 Camp. 388.

235. Upon an indictment for perjury before a surrogate in the ecclesiastical court, the fact of the person who administered the oath having acted as a surrogate, is sufficient *prima facie* evidence of his being duly appointed, and having authority to administer the oath. But if it appear that the surrogate was appointed contrary to the canon, which requires that no judicial act shall be speeded by any ecclesiastical judge, unless the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, and the averment that he had authority to administer the oath is negatived. *Rex v. Verelst*, Esq. 3 Camp. 432.

236. The demise in ejectment is a fiction only; therefore the deed by which a corporation are stated to have demised need not be proved. *Furley ex dem. Corporation of Canterbury v. Wood*, 1 Esp. N. P. C. 198.

Divorce.

Dying declaration.

Ecclesiastical Court.

Ejectment.



237. A notice to quit on a particular day, is *prima facie* evidence of a holding from that day. Doe ex dem. Matthewson v. Wrightman, 4 Esp. C. 7. But see 2 Camp. 387. 647; 13 East, 405.

238. Where an ejectment is brought upon a *proviso* for re-entry for assigning, or underletting, it is sufficient for the lessor, in the first instance, to prove that a third person is upon the premises acting as tenant; and it lies with the defendant to show, that such third person was not in possession as under-tenant or assignee. Doe ex dem. Hindly v. Rickarby, 5 Esp. C. 4.

239. In ejectment by devisees of copyhold premises, to prove the admission of the lessors of the plaintiff, it is not only necessary to prove by the Court Rolls, that persons of their names have been admitted, but evidence must be given of their identity. Doe v. Smith, 1 Camp. 196.

240. In ejectment by one tenant in common against another, it is necessary either to prove an actual ouster, or to produce the consent rule to confess lease, entry, and ouster. Doe v. Cuff, 1 Camp. 173.

241. A notice to quit is not of itself *prima facie* evidence of the period of the year when the tenancy commenced. Doe v. Calvert, 2 Camp. 388.

242. A notice was given on the 22d of March by a landlord to his tenant, to quit at the expiration of the current year. A declaration in ejectment laying the demise on the 1st of November, was on the 16th of January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself. This held to be *prima facie* evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise. Doe and Baker v. Woombevell, 2 Camp. 559.

243. If a notice to quit is served personally on the tenant in possession, and he makes no objection to it, this is *prima facie* evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expired. Thomas v. Thomas, 2 Camp. 647.

244. In ejectment upon the assignment of a term to secure an annuity, a proper memorial of the annuity deeds will be presumed till the contrary is shown. Doe v. Mason, 3 Camp. 7.

245. In ejectment by an executor, it is sufficient *prima facie* evidence that the testator had a chattel interest in the premises, to put in the defendant's answer to a bill in equity, stating, that he believed the testator was possessed of the leasehold premises in the bill mentioned. Doe v. Steel, 3 Camp. 115.

246. In ejectment where the defendant comes in as landlord, it is necessary to shew that he is in the receipt of the rents and profits of the premises to which the lessor of the plaintiff makes title, or that the declaration in ejectment was served upon the tenant in possession of these premises. Fenn ex dem. Phillips v. Cooke and another, 3 Camp. 512.

247. In ejectment where the defendant comes in as landlord, to connect him with the premises to which the lessor of the plaintiff makes title, it is enough to show that the declaration in ejectment was served upon the tenant in possession of these premises. Doe ex dem. Schofield and others v. Alexander, 3 Camp. 516.

248. In ejectment for a house to show that it is situate in the parish mentioned in the declaration, it is *prima facie* evidence, that the

the place in which it stands is watched by the watchmen of that parish. Doe ex dem. Gunson v. Welch, 4 Camp. 264.

249. In ejectment on a clause of re-entry, in case the tenant should assign, let over, or otherwise let the demised premises, it is *not* sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger. And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession. Doe v. Payne, 1 Starkie, 86.

250. A title having been proved in *A.* who continues in possession from 1809 to 1814, and from whom the lessor of the plaintiff, in ejectment derives title in 1815, it is not sufficient for the defendant to prove a bare possession by himself during the year 1814. Doe ex dem. Pitcher v. Anderson and another, 1 Starkie, 262.

251. A lessor in ejectment, who claims title as a purchaser from the sheriff who sells by virtue of a *feri facias*, at the suit of such lessor, must prove the judgment as well as the writ. Doe dem. Bland v. Smith, 2 Starkie, 199.

252. In an ejectment for premises, where the lessor of the plaintiff is party in the original action, in which the execution issues, he is bound not only to produce the writ of *feri facias*, under which the sheriff has sold, but likewise the judgment. Bland v. Smith, 1 Holt, 589.

253. An entry by a clerk or servant cannot be received as evidence of the fact it records, though he is not amenable to the process of the court. Cooper v. Marsden, 1 Esp. N. P. C. 1. Entries.

254. If an entry is made by a shopkeeper in his book of the delivery of articles, which entry is in the usual course of his business, and inspected by a clerk shortly after it was made, who himself saw his master deliver the goods, the entry may be used to corroborate the clerk's testimony in an action against the shopkeeper for them. Digby v. Stedman and another, 1 Esp. C. 328.

255. Entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, are evidence for the tradesman; otherwise not. Calvert v. The Archbishop of Canterbury, 2 Esp. C. 645.

256. Entries by the steward of a manor of the receipt of rents are evidence as well in discharge of the tenants, and of the quantum or nature of the rent reserved as to charge the steward. Calvert v. The Archbishop of Canterbury, 2 Esp. C. 647.

257. In an action by bankers, the indorsees of a bill deposited by a customer who had drawn for the amount, entries by a deceased clerk of payments made on account of the bill, were refused as evidence. Sikes and others v. Marshall, 2 Esp. C. 707.

258. A memorandum signed by a person deceased, who had been owner of a copyhold tenement, and had occupied a slip of garden ground adjoining, stating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is admissible evidence for the lessor of the plaintiff in an ejectment for this garden ground, to show that it is not a part of the copyhold tenement. Doe v. Jones, 1 Camp. 367.

259. Where the defendants had acknowledged that they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial, — *held*, that an entry by a deceased clerk of the plaintiff in a letter book, professing to be the copy of a letter of the same date from the plaintiff to the defendants, was admissible.

missible evidence of the contents of the letter, on proof, that according to the plaintiff's course of business, the letters which he wrote were copied by this clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct. *Pritt and others v. Fairclough and others*, 3 Camp. 305.

260. Entry of the deceased clerk of a merchant in the letter book, received in evidence on proof that it was made in the usual course of business in the merchant's counting house. *Hagedorn v. Reid*, 3 Camp. 379.

261. Upon the trial of an ejectment respecting *long acre* between *E.* and *F.*, in which it was necessary for *E.* to prove that he was the legitimate son of *W.*, the *S. W.* being at that time dead: *E.* after proving by other evidence that *W.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *W.* had made such entry in his own hand-writing, that *E.* was his eldest son born in lawful wedlock from *G.* the wife of *W.* on the 1st May, 1778, and signed by *W.* himself. — *Held*, by the judges, unanimously, that such entry in such Bible (or in any other book, or on any other piece of paper) might be received to prove that *E.* is the legitimate son of *W.* as evidence of the declaration of *W.* in matter of pedigree. *Berkeley Peerage Case*, 4 Camp. 401.

262. Upon the trial of an ejectment respecting *little acre*, between *N.* and *P.*, in which it was necessary for *N.* to prove that he was the legitimate son of *T.*, the said *T.* being at that time dead; *N.* after proving by other evidence, that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own hand-writing, that *N.* was his eldest son, born in lawful wedlock from *I.*, the wife of *T.*, on the 1st day of May, 1778, and signed by *T.* himself: and it was proved in evidence on the said trial, that the said *T.* had declared "that he *T.* had made such entry for the express purpose of establishing the legitimacy, and the time of the birth, of his eldest son *N.*, in case the same should be called in question in any case, or in any cause whatsoever, by any person, after the death of him the said *T.*." *Held* by the judges, unanimously, that such entry in such Bible (or in any other book, or on any other piece of paper) might be received to prove that *N.* is the legitimate son of *T.* as evidence of the declaration of *T.* in matter of pedigree, but with strong circumstances of suspicion on account of its particularity. *Berkeley Peerage Case*, 4 Camp. 401.

263. *A.* the holder of a bill deposits it with *B.* as a collateral security for the balance of accounts between them; *B.* indorses the bill over to *C.* after it becomes due: in an action by *C.* against *A.*, *B.*'s account book is not evidence in diminution of the balance between *A.* and *B.*: But *semble*, a contemporaneous entry or declaration by *B.* would be admissible. And *semble*, *C.* is not entitled to recover from *A.* a sum exceeding the lowest amount of the balance subsequent to the transfer to *B.* *Coltenridge v. Farquharson*, 1 Starkie, 259.

264. A bill with an indorsement upon it "March 4. 1815, delivered a copy to *C. D.*" which indorsement is proved to be in the hand-writing of a deceased clerk of the plaintiff (whose duty it was to have delivered a copy of the bill) and proved to have existed at the time of the date, is evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Starkie, 404.

265. A book in which leases were enrolled, and which was kept in the office of the auditor of the Bishop of Durham; (such officer holding a patent office in the county palatine) held to be admissible evidence

evidence to sustain the claims of a lessee of the bishop of Durham, the original and counterpart of the lease being lost. *Humble v. Hunt*, 1 Holt, 601.

266. In an action against the sheriff for an escape on *mesne* process, a copy of the writ is given in evidence by the plaintiff, and the document contains also a copy of the sheriff's return: the defendant is not entitled to have the copy of the return read as part of the document. In such an action, the sheriff's return of a rescue is not conclusive. *Adey v. Bridges*, 2 Starkie, 189. Escape.

267. The examination of a prisoner before the magistrate previous to his committal, purports to have been taken on oath. Evidence upon the trial of the prisoner for felony, is not admissible to show that in fact the examination was not on oath. *Rex v. Smith and another*, 1 Starkie, 242. Examination.

268. After the examination of a prisoner before a magistrate, upon a charge of felony, has been taken by the magistrate's clerk, it is read over to him, and he is told that he may sign it, or not, as he chooses; having declined to sign it, the examination cannot be read in evidence. *Rex v. Telicote*, 2 Starkie, 483. Excise.

269. The examination of a prisoner before a magistrate, who examines such prisoner as a witness, although he holds out no threat or inducement, cannot be read against him. *Rex v. Wilson*, 1 Holt, 597.

270. An entry by *A.* at the excise office, of premises for the keeping of beer for home consumption, and exportation in the name of himself, *B.* and *C.*, is conclusive against *A.* as far as regards the crown, but is not conclusive with respect to other parties. *Ellis and another v. Watson and two others*. 2 Starkie, 478.

271. To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery. *Rogers v. Allen*, 1 Camp. 309. Fishery.

272. To prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the mayor's court, with an entry of satisfaction, is conclusive evidence. *Husham v. Smith*, 2 Camp. 19. Foreign attachment.

273. The record is only *prima facie* evidence that the debt for which the action was brought in the mayor's court, arose within the limits of the city. *Husham v. Smith*, 2 Camp. 19.

274. As well the unwritten as the written laws of a foreign country can only be proved by documents properly authenticated; not by parol. *Boethlinck v. Schneider*, 3 Esp. C. 58. Foreign matters.

275. The written law of a foreign country cannot be proved by parol. *Hulle v. Heightman*, 4 Esp. C. 79.

276. The written laws of a foreign state can only be proved by copies properly authenticated. *Millar v. Heinrick*, 4 Camp. 155.

277. To prove the acts of state of a foreign government, copies should be produced, examined by the public archives abroad. *Richardson v. Anderson*, 1 Camp. 65. n.

278. A copy of the register of a foreign chapel is not admissible to prove a marriage alleged to have been solemnized therein. *Leader v. Barry*, 1 Esp. C. 353.

279. In an action on a foreign judgment, the judgment pronounced at

at the trial must be authenticated by the seal of the foreign court; or evidence must be given that the court has no seal; and then the judgment may be established by proving the signature of the judge. *Alves v. Bunbury*, 4 Camp. 28.

280. The seal of a foreign colonial court to a judgment therein, as well as the hand-writing of the judge, must be proved. *Henry v. Adey*, 4 Esp. C. 228.; S. C. 3 East 221.

281. If a colonial court possess a seal, it must be used for the purpose of authenticating a judgment of the court, although it is so much worn, as no longer to make any impression. *Cavan and another v. Stewart*, 1 Starkie, 525.

282. A party here is not bound by a colonial judgment, unless it appear either that he was summoned, or it be proved that he was once resident within the jurisdiction; and it is not sufficient that on the face of the proceedings he is described to be an absentee. *Cavan and another v. Stewart*, 1 Starkie, 525.

**Forgery.**

283. In an action against the acceptor of a bill of exchange who defends himself on the ground of his acceptance being forged by *A.*, evidence that *A.* forged his acceptance to another bill, and absconded on that account, is not admissible. *Balcetti v. Serani*, Peake, 142.

284. Where a party sued as acceptor of a bill contends that his name has been forged, evidence that the drawer had been guilty of similar forgeries is inadmissible to prove the fact. *Viney v. Barss*, 1 Esp. C. 293.

285. Upon an indictment for uttering a forged bank note, knowing it to be forged; to shew the prisoners knowledge of the note mentioned in the indictment being a forgery, evidence is admissible of his having a short time before uttered another forged bank note of the same manufacture, and of a number of others likewise of the same manufacture, with his hand-writing on the back of them, having been in circulation. *Rex v. Ball*, 1 Camp. 324.

**Fraud.**

286. In an indictment against defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, the prosecutor may prove various instances of their giving a false representation of their circumstances, as overt acts of the conspiracy. *Rex v. Roberts*, 1 Camp. 399.

287. On the trial of an indictment for a fraud against an agent of government under the control of the treasury, 'a letter of instructions addressed to the defendant by the lords of the treasury, may be read in evidence, without proving the commission by which they were appointed. *Rex v. Jones*, 2 Camp. 131.

**Freight.**

288. In an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for the defendant. *Smith v. Lyon*, 3 Camp. 465.

289. In an action for freight, damage done to the goods by bad stowage cannot be given in evidence either as a complete defence, or in mitigation of damages. *Sheels v. Davies*, 4 Camp. 119.

**Game.**

290. Although it may be a defence to an action for penalties on 5 Anne, c. 14, that the defendant joined in the sport as servant to another, he must give strict evidence, that the person by whose orders he acted was himself qualified to kill game. *Clarke v. Broughton*, 3 Camp. 328.

**Gazette.**

291. The *London Gazette* is not evidence of the military appointments therein notified: but at the trial of an information against an officer in the army for false musters, it is sufficient to prove that he acted in the character mentioned in the information, without proving his commission from the king. *Rex v. Gardner*, 2 Camp. 513.

292. A gazette is not evidence to prove an appointment to a commission in the army. *Kirvan v. Cockburn*, 5 Esp. C. 233.

293. The mere circumstance of a cheque being made payable to *A.*, and of *A.*'s having received payment of it, is not evidence that the maker gave it to him. *Lloyd v. Sandilands*, 1 Gow. p. 15. Gift.

294. A witness cannot depose as to a hand-writing, having seen the party write for the first time pending a suit, in which the genuineness of that writing is disputed, and with a view to his testimony, since the party might designedly have disguised his hand. *Stranger v. Searle*, 1 Esp. N. P. C. 14. Hand writing.

295. Held, in an action against the acceptor of a foreign bill, that the mere opinion, without conviction of a witness who once saw him write was evidence for the plaintiff. *Garrells v. Alexander*, 4 Esp. C. 37.

296. The acceptance of a bill of exchange purports to bear the signature of the acceptor's christian name as well as surname; proof of the latter by a witness who never saw the acceptor write his christian name but once only, is not sufficient. *Powell v. Ford*, 2 Starkie, 164.

297. Comparison of hands is not evidence in civil any more than in criminal cases. *Macferson v. Thaytes*, Peake, 20. *Brookbard v. Woodley*, Id. 20. n.

298. Held, that in an action against the acceptor of a bill, where the defence is that the acceptance is a forgery, the jury may decide by comparing the acceptance with other hand-writing admitted to be the defendant's. *Alesbrook v. Roach*, 1 Esp. C. 351.

299. Persons of skill may be called to ascertain whether hand-writing is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another; but they cannot be asked whether the same hand, which wrote another paper, wrote also the feigned paper. *Rex v. Cator*, 4 Esp. C. 117.

300. Although comparison of hand-writing is not admissible evidence when the fact to be proved is the hand-writing of a particular person, whose *supposed* signature is upon a paper put into the witness's hand; yet, if such witness has a document, to which is affixed the hand-writing of *that* person (as to whose signature the question arises), and which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory; a basis being first laid in his having once seen the defendant sign his name, though he had forgotten the character of his hand-writing. *Burr v. Harper*, 1 Holt, 420.

301. Hearsay evidence is admissible as to public but not private rights. *Withnell v. Gartham*, 1 Esp. C. 324. Hearsay.

302. A copper-plate map taken by the direction of the overseers of a parish is no evidence on an issue whether a particular spot of ground is a highway or not. *Pollard v. Scott*, Peake, 19. Highway.

303. If an indictment for not repairing a highway against a parish consisting of three townships, viz *A. B.* and *C.*, there is a plea on the part of *C.* that each of the three townships has immemorially repaired its own highways separately; the records of indictments against the parish generally, for not repairing highways situate in *A.* and *B.* with general pleas of not guilty, and convictions thereupon, are *prima facie* evidence to disprove the custom for each township to repair separately; but evidence will be admitted that these pleas of not guilty were pleaded by inhabitants of *A.* and *B.* without the privy of the inhabitants of *C.* *Rex v. Eardisland*, 2 Camp. 494.

304. Upon

304. Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair *ratione tenuræ*, an award made under a submission by a former tenant for years of the premises can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation being *post litem motam*. *Rex v. Cotton*, 3 Camp. 444.

305. Where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord and a dedication by him to the public may be presumed, although he was never in the actual possession of the close himself, and he is not proved to have been near the spot; where a way is so used, notice of the fact to the steward is notice to the landlord. *Rex v. Barr*, 4 Camp. 16.

306. Though the right of the soil in a public highway belongs to the owner of the adjoining closes (when no other proprietor appears) *usque ad filum viæ*; this is only a presumption of law in his favour, when the original dedication of the road cannot be shown by positive evidence: and if there are circumstances in the case which bring this presumption of property in question, the plaintiff, who claims such road in an action of trespass, must give some other evidence of property beyond the mere presumption of law. *Headlam v. Hedley*, 1 Holt, 463.

Hundred.

307. In an action against the hundred on the riot act, for damage done to a house, the breaking of inside window shutters, a window sill, and the wood of the fan light, is sufficient evidence of a beginning to pull down, if the mob are interrupted and dispersed while committing these acts of violence by an alarm of the approach of the military. *Sampson v. Chambers and another*, 4 Camp. 221.

308. Proof that the mob, after breaking open the door, tearing down the window-frames, and doing other serious damage to a house, were interrupted in their proceedings by a military force, is evidence from which a beginning to demolish (in an action against the hundred) is to be presumed; but if the mob, after committing such mischief, voluntarily retire, without proceeding to demolition, it is a question for the jury, whether there was a beginning to demolish. *Lord King v. Chambers*, 1 Starkie, 195.

Infant.

309. An account stated by an infant is not evidence after he attains his age, even to show that he has been supplied with the necessaries mentioned in the account. *Inofedew v. Douglas*, 2 Starkie, 36.

In habitancy

310. An indictment averred that *A.* was, and now is, an inhabitant legally settled in *X.*; held, that the averment was *primæ facie* proved by production of an order of removal to *X.*, since the presumptions were that he had not gained a new settlement since. *Rex v. Tanner and another*, 1 Esp. C. 304.

Insolvent Debtor.

311. If an insolvent debtor can himself be produced, his letters are not evidence for the defendant in an action for his effects brought by his assignees. *Smith and another v. Simmes*, 1 Esp. C. 330.

312. To prove that the plaintiff was discharged under an insolvent act after the cause of action accrued, and before action brought, it is not enough to give in evidence a parol acknowledgement by him; but the clerk of the peace should be called and the order of sessions produced, to show the regularity of the proceedings. *Scott v. Clare*, 3 Camp. 236.

313. In order to prove the order of the insolvent debtor's court, for the discharge of a debtor, it is not sufficient to produce and prove the

the order to the marshal for the discharge of the debtor reciting the judgment, the original entry of the judgment by the court ought to be produced. Doe on the demise of Robinson v. Barton, 2 Starkie, 473.

314. The policy, being the best evidence, and not the books of the insurance office, must be produced to prove the fact of the insurance. *Insurance.* Rex v. Doran, 1 Esp. N. P. C. 127.

315. The exercising arts of ownership and paying workmen employed, are sufficient proof of interest in property insured. Amery v. Rogers, 1 Esp. N. P. C. 207.

316. The bill of lading with the captain's testimony that he had the goods mentioned therein on board, are evidence of property in the consignee in an action of insurance. M'Andrew v. Bell, 1 Esp. C. 373.

317. The log-book of the man of war which convoyed the fleet is evidence of the facts relative to the fleet therein mentioned; such as the time at which a particular ship sailed. D'Israeli v. Jowett, 1 Esp. C. 427.

318. The captain's protest is not evidence in chief; it can only be read to contradict his evidence. Christian v. Coombe, 2 Esp. C. 490.

319. Lloyd's book is evidence of a capture; but not that an under-writer had notice of it, unless coupled with circumstances, whence it may be inferred that he has inspected it. Abel v. Potts, 3 Esp. C. 242.

320. The Sound and Petersburg lists, ascertaining the arrival of ships, not being on oath, are not evidence. Roberts and another v. Eddington, 4 Esp. C. 88.

321. The ordering and paying for stores furnished for a ship is presumptive proof of ownership in an action on a policy on the ship. Thomas and others v. Foyle, 5 Esp. C. 88.

322. In an action by the assured against an under-writer for a return of premium; the policy is conclusive evidence of the receipt of the premium by the defendant. Dalzell v. Mair, 1 Camp. 532.

323. In an action on a policy of insurance, where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the plaintiff must prove that when she left the port of outfit she was bound upon the voyage insured. For this purpose the convoy-bond, mentioning the port of destination in the common form, is *prima facie* evidence. Cohen v. Huickley, 2 Camp. 51.

324. A licence is *prima facie* evidence that when a ship left her port of outfit she sailed upon the voyage insured. Marshall v. Packer, 2 Camp. 69.

325. In an action on a policy from an English to a foreign port to found a presumption that the ship was lost on the voyage, it is enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to show that she never arrived there. Twemloe v. Oswin, 2 Camp. 85.

326. If a ship insured is merely represented as neutral, a sentence of a foreign court of admiralty condemning her for a violation of the laws of neutrality, is not evidence to falsify the representation. Von Tungeln v. Du Bois, 2 Camp. 151.

327. A count on a policy of insurance laying the loss by capture, is sustained by evidence that the ship was captured by a privateer, although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff might have recovered under a count laying the loss by barratry of the master. *Arcangelo v. Thompson*, 2 Camp. 620.



328. To prove a warranty that a ship insured was of a particular nation, it is *prima facie* evidence that she carried the flag of that nation at times when she was free from all danger of capture; and that the captain addressed himself to the consul of that nation in a foreign port. *Arcangelo v. Thompson*, 2 Camp. 620.

329. The production of a letter dated abroad, and addressed to *J. S. in England*, with the English ship letter post-mark upon it, which directed a policy to be effected, is sufficient to prove that *J. S.* was "the person residing in *Great Britain* who received the order for and effected such policy." *Arcangelo v. Thompson*, 2 Camp. 620.

330. When a ship insured is captured in a voyage to an enemy's country, and the British licence legalizing the voyage is lost, to show that she had such a licence, it is necessary to prove the loss of the paper purporting to be a licence put on board the ship, and to produce examined copies of the order in council for granting the licence, and of the copy of the licence preserved in the secretary of state's office. *Eyre v. Palsgrave*, 2 Camp. 605.

331. In an action on a policy of insurance on a voyage "to any port in the Baltic," evidence admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated as separate and distinct by geographers. *Uhde v. Walters*, 3 Camp. 16.

332. To support an averment in a declaration on a policy of insurance on goods, "that the ship, with the goods on board, when at *A.*, was arrested by the persons exercising the powers of government there, and the goods were then and there, by the said persons, seized, detained, and confiscated," it is enough to show that the goods were forcibly taken from on board the ship by the officers of government and never delivered to the consignees, without putting in any sentence of condemnation. *Carruthers v. Gray*, 3 Camp. 142.

333. To invalidate a policy on ship on the ground that she sailed without convoy, it is necessary to prove that this happened with the privacy of the owner. *Metcalf v. Parry*, 4 Camp. 125.

334. In an action on a policy of insurance, it will be presumed that the ship complied with the provisions of the convoy act, till the contrary is proved. *Thornton and others v. Lance and others*, 4 Camp. 231.

335. In an action for effecting policies of insurance, it is necessary to prove their existence by producing them. *Williams and others v. Younghusband*, 1 Starkie, 139.

336. A licence is granted to *A.* and *B.* for permitting vessels bearing any flag to import certain specified articles; in order to show the legality of the voyage in an action against an insurer, it is sufficient to show that the licence has been applied to the ship and voyage in question, without further connecting the plaintiff with *A.* and *B.* to whom the licence was granted. *Butler v. Allnutt*, 1 Starkie, 222.

337. A licence to import certain specified articles having been deposited in the custom-house, and accidentally destroyed, it is to be presumed that the time of clearance as required by the order in council was indorsed upon it, upon its being shown that without such indorsement the custom-house would not have permitted the entry to have been made. *Butler v. Allnutt*, 1 Starkie, 222.

338. In an action on a policy on goods, the bill of lading, signed by the captain, is not evidence to prove the plaintiff's interest in the goods. *Dickson v. Lodge*, 1 Starkie, 226.

339. *A.* undertakes to act as the agent of *B.* in recovering the amount

amount of an insured cargo, subject to the superior claim of *C.*, who resides abroad. In an action by *B.* against *A.* to recover his proportional share of the amount recovered by *B.*, an invoice sent by *C.*, but to which *A.* is not privy, is not admissible in evidence against *A.* in order to show the extent of *B.*'s interest. *Mendham and another v. Thompson and another*, 1 Starkie, 316.

340. An insured vessel is warranted to carry a French licence. It is not sufficient to show that the captain of the vessel, in 1813, before the vessel sailed from *Dantzic*, received a document which purported to be a French licence, without showing that he received it from some officer or person in authority under the French government; but proof that, after the arrival of the vessel at *Bordeaux*, she was allowed to remain there for upwards of a month, after an inspection of the French licence, and other documents, by the officer of the French government, is *prima facie* evidence that the document is genuine. *Everth v. Tunno*, 1 Starkie, 508.

341. A vessel with liberty to chase and capture prizes, has some Spanish prisoners on board. By means which did not appear, they break loose, rise upon and imprison the crew, with the exception of one sailor, who is heard upon the deck in conversation with them. The captain and crew, with the exception of this sailor, are put on shore and the Spaniards run away with the ship. Upon a loss alleged to be by barratry of the mariners, this is evidence to be left to the jury that such barratry was committed. *Hucks and another v. Thornton*, 1 Holt, 30.

342. The opinion of under-writers whether, upon certain facts being communicated to them, they would have insured or not the particular voyage, cannot be received as evidence. The materiality of the intelligence or rumours, which the assured is charged with having suppressed, is a question for the jury under the circumstances of the case, and ought not to rest upon the opinion of mercantile men. *Durrell and another v. Bederley*, 1 Holt, 283.

343. A bill delivered by the plaintiff for business done for the assured (the defendant being one), but in which he debits the defendant with three-seventenths only of the whole amount, is *prima facie* evidence (the defendant having pleaded in abatement) that the action was brought to recover the defendant's particular share only. *Pasmore v. Bonsfield*, 1 Starkie, 296.

Joinder in action.

344. A judgment of the court of conscience for London is void, unless the defendant, when it was given, was resident within the jurisdiction of the court; a fact that will not be presumed, without further proof, in an action thereon. *Coore v. Keneday*, 3 Esp. C. 280.

Judgment.

345. In an action against three, two of whom claim under the third, a judgment in a former action upon the same point between the third defendant and the present plaintiff, is evidence against all. *Strutt v. Boringdon and others*, 5 Esp. C. 58.

346. The day-book kept at the judgment office is not evidence to prove the time at which judgment was signed. *Lec v. Meacock*, 5 Esp. C. 177.

347. Where an execution on a judgment under a warrant of attorney, at the suit of *A.* against *B.*, is given in evidence as presumptive proof that a judgment from *A.* to *B.* is fraudulent, the affidavit on which the first judgment was entered up is likewise admissible for the same purpose. *Penn v. Scholey and another*, 5 Esp. C. 243.

348. If *A.* is convicted before a magistrate on the evidence of *B.*;

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although *B.*'s name does not appear on the conviction, he cannot avail himself of it in any civil proceeding between him and *A.*, *Smith v. Rummens*, 1 Camp. 9.

349. If *B.* and *C.* are convicted of a conspiracy on the prosecution of *A.*, the conviction is not admissible evidence in an action afterwards brought against them by *A.* for the same conspiracy. *Hathaway v. Barrow*, 1 Camp. 151.

350. The sentence of a foreign court of admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference. *Fisher v. Ogle*, 1 Camp. 418.

351. The sentence of condemnation of a foreign court of admiralty cannot be received in evidence, without previous proof of the ship having been captured. *Marshall v. Parker*, 2 Camp. 69.

352. The sentence of the court of admiralty condemning certain goods as captured from the enemy, conclusive evidence that they were so captured. 2 Camp. 228.

353. An action may be maintained upon a foreign judgment obtained by default, which states that the defendant appeared by attorney, without proving that the attorney mentioned had authority to appear, or that the defendant was living within the jurisdiction of the foreign court. *Maloney v. Gibbons*, 2 Camp. 502.

354. Copy of sentence of condemnation not evidence, though handed over by assured to under-writers. *Hindt v. Atkins*, 3 Camp. 215.

355. To support an averment in an indictment for receiving stolen goods, that the principal felon had been duly convicted, it is sufficient to give in evidence the examined copy of a record, showing that he was found guilty of the felony before a court of competent jurisdiction; however informal the proceedings may appear, and however erroneous the judgment on the felon. *Rex v. John Baldwin*, 3 Camp. 265.

Judicial proceedings.

356. A warrant is directed to *A.* and *B.*; it is evidence that the arrest under it was by *B.*, that the person who made the arrest called himself *B.*, notwithstanding the warrant is indorsed executed by *A.* *Slack v. Brander and others*, 1 Esp. N. P. C. 42.

357. It seems that a judge's order for staying proceedings on payment of costs, with proof of payment, is not sufficient evidence of the termination of the suit in a subsequent action for a malicious arrest in that suit. *Kirk v. French*, 1 Esp. N. P. C. 80.

358. A bill in chancery is not evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer on the deposition of witnesses. *Doe ex dem. Bowerman v. Sybourn*, 2 Esp. C. 496. S. C. 7 T. R. 3.

359. Under an averment that a warrant of attorney given to secure an annuity had been set aside, the warrant itself, as well as the rule of court, must be produced. *Compton v. Chandless*, 4 Esp. C. 18.

360. The title of the declaration, though not evidence of the time of the commencement of the suit, which must be proved by the writ, is evidence of an existing demand at the period of entitling. *Mathews v. Haigh*, 4 Esp. C. 100.

361. It will be presumed that a writ has been returned, until the contrary is shown. *Edmonstone v. Plaisted*, 4 Esp. C. 160.

362. To show that a writ was issued in a particular cause, the proof of the *præcipe* by the filazer's book, and that notice was given to

to the opposite party to produce the writ, is insufficient; it must be shown that the treasury was searched, and no writ (returned) was found, and that after the return-day it was in the opposite party's possession, who had notice to produce it. *Edmonstone v. Plaisted*, 4 Esp. C. 160.

363. A declaration against an attorney for practising without a certificate averred, "that he filed a declaration in a suit then depending;" a declaration out of the office, indorsed with the defendant's handwriting, to plead within a limited time, is sufficient proof that a suit was then depending, to satisfy the averment. *Edmonstone v. Plaisted*, 4 Esp. C. 161.

364. In making title under a writ of execution, as well the judgment as (the writ and) the assignment by the sheriff must be produced. *Hoffman v. Pitt*, 5 Esp. C. 24.

365. Proof of the day on which a trial took place may be by parol. *Thomas v. Ansley and another*, 6 Esp. C. 80.

366. The allegations, "that a particular cause came on to be tried before a jury of the country," and "that a jury was sworn," can only be proved by the record. *Rex v. Hammond*, 6 Esp. C. 83.

367. To support an allegation, that to an information in chancery against *T. Eamy*, "the answer of the said *T. Eamy* was filed," it is enough to put in an office-copy of an answer to the information, entitled "the answer of *T. Eamy*," although this be signed *T. Eamy*. *Salter v. Turner*, 2 Camp. 87.

368. Where it is material for the defendant to show that the action was commenced earlier than it appears to have been by the *Nisi Prius* record, the declaration delivered by the plaintiff is admissible evidence. *Harris v. Orme*, 2 Camp. 497. n.

369. In an action against an attorney for goods sold, the plaintiff proved that he filed his bill at half-past eleven o'clock in the forenoon of 24th Dec., and the defendant gave in evidence a receipt for the sum demanded, dated the same day. Held that this was no answer to the action, without proof that the payment was made before filing of the bill. *Godard and another v. Benjamin*, 3 Camp. 331.

370. The notoriety of a circumstance is a sufficient proof of knowledge. *Rinquist v. Ditchell*, 3 Esp. C. 64.

371. In a question between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid is not admissible. *Charter v. Pryke, Peake*, 95. Landlord and tenant.

372. The assignee of a lease, to show his interest in the premises, is bound to prove the execution of the lease, and all the mesne assignments. *Crosby v. Percy*, 1 Camp. 303.

373. An acceptance of a surrender of a lease is not to be presumed from the circumstance of the rent having been paid, not by the original tenant, but by a third person. *Copeland v. Watts and another*, 1 Starkie, 96.

374. In an action for the use and occupation of a house for six months, it is *prima facie* sufficient for the plaintiff to show an occupation of the house by the defendant, as his tenant, for the preceding six months, since the continuance of the tenancy is to be presumed until the contrary appear. And it is not sufficient, in such case, for the defendant to prove that the keys had been previously delivered to a servant at the plaintiff's house, and a subsequent declaration on the part of the plaintiff that the keys had been lost or mislaid. *Harland v. Bromley*, 1 Starkie, 455.

375. A custom for the tenant of a farm in a particular district,  
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to provide work and labour, tillage, sowing, and all materials for the same, in his away-going year, and for the landlord to make him a reasonable compensation for the same, is valid in law, notwithstanding the farm is held under a written agreement; provided such agreement does not, in express terms, exclude the custom. *Senior v. Armytage*, 1 Holt, 197.

Letters.

376. The defendant's letters, promising to pay the plaintiff's demand, are evidence, without producing those to which they are answers. *Lord Barrymore v. Taylor*, 1 Esp. C. 326.

Libel.

377. To prove the defendant author of a libel, evidence of other libels written by the same person, and concerning the same subject, may be received. *Rex v. Pearce, Peake*, 75.

378. In an action for a libel in a newspaper, proof that the paper is a regular and periodical publication is admissible to exclude the idea that the publication in question was inadvertent. *Plunkett v. Cobbett*, 5 Esp. C. 136.

379. In an action for a libel, the defendant may read, in mitigation, a speculative opinion in a book of the same tendency with the libel; but not to establish a fact. *Plunkett v. Cobbett*, 5 Esp. C. 138.

380. Action for a libel contained in a letter written by the defendant to the plaintiff: proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, is evidence to go to the jury of the defendant's intention that the letter should be read by a third person. *Delacroix v. Thevenot*, 2 Starkie, 63.

381. Under the plea of *not guilty* to a declaration for a libel, the plaintiff cannot go into evidence to show that the allegations in the libel are false; neither can he give in evidence subsequent declarations by the defendant, where the intention of the publication is not equivocal. *Stuart v. Lovel*, 2 Starkie, 93.

382. In an action for a libel, other papers which are themselves libels on the plaintiff, may be given in evidence to increase the damages. *Lee v. Huson, Peake*, 166.

383. Any thing short of proof of the truth of a libel may be given in evidence under the general issue, in an action thereon. *Mullett v. Hulton*, 4 Esp. C. 248.

384. In an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. *Tabart v. Tipper*, 1 Camp. 350.

385. In an action for a libel, the defendant, under the general issue, may prove, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relations and acquaintance had ceased to associate with him. *Earl of Leicester v. Walker*, 2 Camp. 251.

386. In an action on a libel to which the general issue is pleaded, and where there is no justification, the defendant may give in evidence, in mitigation of damages, not only that there were rumours and reports (of the same tenor as the libel) previously current, but that the substance of the libellous matter had been published in a newspaper; and he is not required to lay a basis for this evidence by producing such newspaper at the trial. *Wyatt v. Gore*, 1 Holt, 299.

387. In

387. In an action for a libel, the plaintiff cannot give in evidence other libels published concerning him by the defendant, unless they directly refer to the libel set out in the declaration. *Finnerty v. Tipper*, 2 Camp. 72.

388. On the trial of an information for a libel in a newspaper, the defendant has a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character. *Rex v. Lamber*, 2 Camp. 398.

389. In an indictment for a libel, the post-mark of a particular place within the county in which the *venue* is laid, upon a letter containing the libel, is not sufficient evidence of a publication there by the defendant. *Rex v. Watson*, 1 Camp. 215.

390. The receipt of money under a banker's check is not evidence of a loan between the parties. *Egg v. Barnett*, 3 Esp. C. 197. Loan.

391. The receipt of money under a banker's check is not evidence of a loan. *Carey and another v. Gerrish*, 4 Esp. C. 9.

392. A loan of money by *A.* to *B.* is not to be inferred from the bare fact that *A.* delivered a sum of money to *B.*, which *A.* had borrowed from another. *Welch and another v. Seaborn*, 1 Stark. 474.

393. The common seal of the corporation of London is admitted without farther proof. *Doe, ex dem. Woodmass v. Mason*, 1 Esp. N. P. C. 53. London.

394. Where to an action against executors on the bond of their testator, they plead *non est factum*, and set up lunacy as a defence at the trial; an inquisition taken under a commission of lunacy against the testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence. *Faulder v. Silk*, 3 Camp. 126. Lunacy.

395. In an action for a malicious prosecution, the plaintiff must give positive evidence of the want of probable cause, although the defendant dropped the prosecution, and did not appear when the indictment came on to be tried. *Purcel v. Macnamara*, 1 Camp. 199. Malicious prosecution.

396. So the want of probable cause must be proved; although the bail was thrown out by the grand jury. *Sykes v. Dunbar*, 1 Camp. 202. n.

397. Or although the defendant, after binding the plaintiff over to the sessions, did not appear to prefer an indictment against him. *Wallis v. Alpine*, 1 Camp. 204. n.

398. Or although there be evidence of malice in the prosecutor. *Inledon v. Barry*, 1 Camp. 203. n.

399. In an action for a malicious prosecution, the defendant, after proving circumstances of suspicion against the plaintiff, may give evidence of his general bad character, in order to show that he had probable cause for instituting the prosecution. *Rodriguez v. Tadmir*, 2 Esp. C. 721.

400. In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to show that the plaintiff's character was suspicious, and that his house had been searched on former occasions. *Newsam v. Carr*, 2 Starkie, 69.

401. In a suit for maliciously holding to bail, malice cannot be inferred from the bare fact that the defendant paid a less sum into court, which the plaintiff took out and discontinued his action. *Jackson v. Burleigh*, 3 Esp. C. 34. Malicious suit.

402. To support an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved. On proof of a total want of probable cause, malice may be implied; but although express malice be proved, some slight evidence of a want of probable cause must be given. *Turner, Bart v. Turner*. 1 Gow. p. 20.

403. In an action for a malicious arrest, to show the former suit determined, it is enough to put in a rule to discontinue on payment of costs and to prove costs, taxed and paid. *Bristow v. Haywood*, 4 Camp. 214. S. C. 1 Starkie 48.

404. In an action by *A.* against *B.* for suing out a second writ of *fieri facias* before the sheriff had made any return to the first, the sheriff's returns to the first and second writs, stating that the execution was so conducted at *A.*'s request, and with his consent, are *prima facie* evidence for *B.* against *A.* to support a plea of licence. *Gifford v. Woodgate*, 2 Camp. 117.

Manor.

405. It is sufficient proof that a place is a manor, that it is reported such, without proof of the holding of courts. *Curzon and another v. Lomax*, 5 Esp. C. 60.

406. Where issue is taken on the custom of a manor pleaded as appertaining to a particular tenement, though in point of fact it pervades the whole manor, the evidence is, by the mode of pleading, tied up to the particular tenement. *Wilson v. Page*, 4 Esp. C. 71.

407. Evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant, the lord of the manor, by deed, that the confirmation of the commoners was essential to an alienation of part of such common. *Drury v. Moore*, 1 Starkie, 102.

Marriage.

408. An action for *crim. con.* If the plaintiff's marriage was solemnized in a chapel, he must give some evidence that banns were usually published there before the passing of the marriage act. But it is *prima facie* sufficient for this purpose, to produce an old register of marriages solemnized in the chapel before the passing of the marriage act, and a regular register of banns published there since, and to prove, that within the recollection of witnesses, who have attended the chapel, marriages have been solemnized, and banns published in it, from time to time of late years. *Taunton v. Wyborn*, 2 Camp. 297.

409. In an indictment for bigamy, the marriage must be proved by copies of the registers. *Leader v. Barry*, 1 Esp. C. 354.

410. *Seem*, that to prove a Jewish marriage, it is not enough to produce witnesses who were present at the ceremony in the synagogue; but that the written contract between the parties should be produced, and the execution of it proved. *Horn v. Noel*, 1 Camp. 61.

411. The Fleet books are inadmissible evidence on a question of pedigree. *Lawrence v. Dixon*, Peake, 136.

412. The marriage registers of the Fleet are not evidence. *Doe, ex dem. Orrel v. Madox*, 1 Esp. N. P. C. 197. *Read v. Passer*, Id. 273. Peake, 231.

413. But the general reputation of the family that the parties were married in the Fleet, is good evidence. *Reed v. Passer*, Peake, 232.

414. On a replication that *A.* was not married to *B.*, proof that *A.* was then married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the issue. *Ganer v. Lady Lanesborough*, Peake, 17.

415. *A.* states to the father of the plaintiff, that he has pledged himself to marry his daughter in six months, or in a month after Christmas. Although this varies from the premises laid in the special counts, it is evidence from which the jury may infer a promise to marry generally. *Potter v. Deboos*, 1 Starkie, 82.

416. Under a defence to an action for a breach of promise of marriage, that the party was of bad character, evidence of the opinion of the neighbourhood is evidence, without calling those with whom the witness conversed. *Foulkes v. Sellway*, 3 Esp. C. 236.

417. If money is tendered to a servant at the debtor's house, who receives it, goes in, and returns with an answer that his master will not receive it, this is presumptive proof that it was offered to and refused by the master. *Anon*, 1 Esp. C. 349. *Hayward v. Hague*, 4 Esp. C. 93.

Master and servant.

418. Where a master is in the habit of paying his workmen on stated days; proof that one regularly attended with the others, that the others were always paid, and that they never heard the one complain of non-payment, is evidence that he received his wages regularly. *Lucas v. Novosilieski*, 1 Esp. C. 296.

419. Where a servant is in the habit of receiving sums of money for the use of his master, and by the established course of dealing the servant pays these over to the master from time to time without any written vouchers passing between them, the presumption of law is, that all sums so received by the servant are regularly paid over to the master; therefore, where there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use, but the *onus* lies upon him to prove by positive evidence that the servant has not duly accounted with him. *Evans v. Birch*, 3 Camp. 10.

420. Where premises are in the possession of a tenant, and there is judgment in ejectment against the casual ejector; in an action for *mesne* profits and costs of ejectment against the landlord, the judgment in ejectment is no evidence against him, without proof that he had notice of the ejectment, so that he might have come in to defend it; but a subsequent promise by him to pay the rent and costs, amounts to an admission that he is liable to the action. *Hunter v. Britts*, 3 Camp. 455.

Mesne profits.

421. If it is notorious that a dog has been bit by a mad dog, and the owner afterwards confine it, the presumptions are that he knew of the accident; so that if it breaks loose and bites *A.*, the owner is liable. *Jones v. Perry*, 2 Esp. C. 482.

Mischievous animals.

422. In an action on the case for keeping a dog which bit the plaintiff, it is not sufficient to show that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant promised to make a pecuniary satisfaction to the plaintiff after the latter had been bit by the dog. *Beck and wife v. Dyson*, 4 Camp. 198.

423. In an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog lest he should be bitten, is evidence to go to a jury of the allegation that the dog was accustomed to bite mankind. *Quære*, whether such an allegation be necessary. *Judge v. Cox*, 1 Starkie, 285.

424. In an action for keeping a dog accustomed to worry, and which had worried plaintiff's sheep, it is not necessary to prove that the dog had previously worried sheep. If the dog be proved to be generally



generally mischievous, it will be sufficient; and the declaration need not be special. *Sed quære*, 1 Lord Raymond, 110. *Hartley v. Harman*, 1 Holt, 617.

Misrepresentation.

425. In an action for a fraudulent misrepresentation of another's circumstances, proof that a similar misrepresentation was made by the defendant to third persons, is evidence against him. *Beal v. Thatcher*, 3 Esp. C. 194.

426. In an action on the case for falsely representing the character of another, by reason of which false representation he obtained credit of the plaintiff: it is necessary to prove against the defendant *both* fraud and falsehood; viz. that the representation which he made was *false*, and that the defendant *knew* it to be false at the time he made it. Falsehood without fraud is not sufficient. *Ashlin v. White*, 1 Holt, 387.

Mortgage.

427. One who has been mortgagee of certain premises afterwards takes a conveyance in fee-simple, in which the same premises are described as unincumbered, from a vendee of the mortgagor; this, in the absence of fraud, is conclusive evidence to show that the amount of the first mortgage was paid. *Jones v. Williams*, 2 Starkie, 52.

Name.

428. If a defendant, sued by the name of *A.* pleads, in abatement, that he was baptized by the name of *B.*, he must prove that this name was given him by baptism; and it is not enough for him to show that he has always been known and called by the name of *B.* *Welcker v. Le Pelletier*, 1 Camp. 479.

Naval stores.

429. If the defendant, in an information on stat. 9 and 10 W. 3. c. 41., and 17 Geo. 2. c. 40., for having naval stores in his possession, contend that he purchased them from a third person, who himself bought them at a sale by the navy board, he need not produce the navy board certificate in proof of the original sale, but may establish it by other evidence. *Rex v. Banks*, 1 Esp. C. 146.

Navy register.

430. The register of the navy office is admissible to prove the death of a sailor. *Wallace v. Cook*, 5 Esp. C. 117.

Newspaper.

431. To prove the publication of a newspaper, it is not necessary to produce a copy which has been actually published. *Rex v. Pearce, Peake*, 75.

432. To render the certified copy of the affidavit made by the proprietor of a newspaper evidence under 38 G. 3. c. 78., it must either appear upon the jurat that the person before whom it was made, had authority to take it, or this fact must be proved *aliunde*. *Rex v. White*, 3 Camp. 99.

433. But it is sufficient evidence of publication at common law to put in the original affidavit of the proprietor, stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there. *Rex v. White*, 3 Camp. 100.

Notice.

434. An advertisement published in several daily newspapers, is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading, one of the newspapers in which it appeared. *Boydell v. Drummond*, 2 Camp. 157.

Oppression.

435. In an action against a governor of a colony by the surveyor-general, who held that appointment in the colony (such office being an office at will), for suspending him, maliciously and without probable cause, it is necessary for the plaintiff to prove express and positive malice. *Wyatt v. Gore*, 1 Holt, 299.

Parish.

436. On an issue whether a churchwarden ought to be elected by the select vestry, a record between a former churchwarden and another

another person is admissible evidence. *Berry v. Banner*, Peake, 156.

437. On an issue as to the boundaries of a parish, old papers found in the possession of the late incumbent, deceased, are evidence. *Earl v. Lewis*, 4 Esp. C. 1.

438. A terrier or map of a parish, not signed by any purporting to be parishioners or parish officers, though found amongst parish papers of undoubted authenticity, is not evidence of the boundaries of the parish. *Earl v. Lewis*, 4 Esp. 3.

439. An act of parliament for regulating the concerns of the poor in a particular parish requires that certain notice shall be given of a vestry for the election of a treasurer; and that a treasurer shall be elected at a vestry held in pursuance of such notice. To support an allegation, in an indictment, that "*A.* was duly elected treasurer of the said parish," an entry in the vestry-book, stating that *A.* was elected treasurer at a vestry duly held in pursuance of notice, is sufficient evidence. *Rex v. Martin*, 2 Camp. 100.

Parish books.

440. In action for the costs of a frivolous petition against the election of a member of parliament, it is not necessary to prove either the defendant's subscription of the petition, or a demand of the costs previous to the commencement of the action. *Cleveland v. Wilson*, Peake, 107.

Parliament.

441. A Jewess may be permitted to give parol evidence of her own divorce in a foreign country, according to the custom of the Jews there. *Ganer v. Lady Lanesborough*, Peake, 18.

Parol evidence.

442. Proof of delivery of a paper to the servant of the defendant is not of itself sufficient to enable the prosecutor to give parol evidence of it. *Rex v. Pearce*, Peake, 76.

443. Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance without producing them. *Roberts v. Doxon*, Peake, 83.

444. Parol evidence of a letter containing an account of the dishonour of a note of hand is not admissible, unless notice has been given to produce such letter. *Shaw v. Markham*, Peake, 165.

445. The rule that parol evidence of a written instrument in possession of a party to the cause is inadmissible without previous notice to produce it, holds where, by the nature of the action or pleadings, he is apprised that it will be proved at the trial; thus, where trover is brought for a bill of exchange. *Cowan v. Abrahams* and another. 1 Esp. N. P. C. 50.

446. As well in the case of an ancient private deed as the king's charter, usage is admissible in the construction of ambiguous passages; and it is not necessary that the usage be proved to have been as ancient as the charter. *Withnell v. Gartham*, 1 Esp. C. 322; S. C. 6 T. R. 388.

447. If a party refuses to produce a deed or notice from his adversary, secondary evidence is admissible, though the deed consist of two parts, provided the adversary has not the other. *Doxon v. Haigh* and another, 1 Esp. C. 411.

448. Where, after issue joined, the cause is referred, that fact must be proved by the record. *Rex v. Page*, 2 Esp. C. 650. n.

449. Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved. *Breton v. Cope*, Peake, 30. *Marsh v. Colnet*, 2 Esp. C. 665.

450. A warrant of attorney is given to two as a security for a joint debt, and the money afterwards paid to one alone. In an action by the other for his share, he may prove the circumstances and payment,

ment, without producing the warrant of attorney. *Bayne v. Stone*, 4 Esp. C. 13.

451. A verbal order may be proved by parol, without producing a memorandum of its terms made by the person to whom it was given, but not signed by the other. *Dalison v. Stark*, 4 Esp. C. 163.

452. Where a witness was called, on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that after the commencement of the action he had given it to the plaintiff, in this case, though notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpoena. *Leeds v. Cook*, 4 Esp. C. 256.

453. If a verbal demand and a demand in writing are made at the same time, for the purpose of bringing an action of trover, and the one has no reference to the other; evidence of the verbal demand is sufficient, without the production of the writing. *Smith v. Young*, 1 Camp. 439.

454. Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without notice to produce it. *Ackland v. Pearce*, 2 Camp. 601.

455. In an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement, entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due. *Hoare v. Graham*, 3 Camp. 57.

456. If there be one invariable mode in which bills of exchange are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced. *Spencer v. Billing*, 3 Camp. 310.

457. If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them it is not competent for the defendant to give parol evidence that it was a condition of sale that the goods should be taken away immediately; or that, by the usage of trade, where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract. *Greaves v. Ashlin*, 3 Camp. 426.

458. Where the master of a ship was hired for a voyage to the East Indies by a written agreement, which stipulated that he should receive 120l. "in lieu of privilege," and a question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "privilege:" held, that what the parties said upon the subject before and at the time when the agreement was entered into, was admissible in evidence; and that the holder then having told the master he should have the use of the cabin for his own benefit, the latter had a right to retain the cabin freight. *Birch and another v. Depeyster*, 4 Camp. 385; *S. C.* 1 Starkie, 216.

459. Policies of insurance having been delivered to the assignees of a bankrupt, one of whom is since dead, proof of an application to the attorney under the commission for such policies, who did not know what had become of them, does not warrant the admission of secondary evidence. *Williams and another v. Younghusband*, 1 Stark. 139.

460. After notice to produce a letter written by the plaintiff to the defendant, parol evidence of its contents may be given by any one who recollects the contents, although it is in the plaintiff's power to

to produce the clerk who wrote the letter. But in such case the contents cannot be proved by the production of a copy of the original copy. *Liebman and others v. Pooley and others*, 1 Starkie, 167.

461. By the contract between the owners and captain of an India ship, the latter is to receive a certain compensation in lieu of privilege and primage; a conversation between the parties previous to the contract is evidence to show in what sense they intended to use the word "privilege." *Birch v. Depeyster*, 1 Starkie, 210.

462. At the time of hiring a horse a note of the agreement is made, stating the time and price, the plaintiff is not precluded proving by parol evidence additional terms of agreement. *Jeffery v. Walton*, 1 Starkie, 267.

463. In an action, against one of several members of a society established under a deed of co-partnership for goods supplied to the society, the defendant may be proved to be a partner by parol evidence, without producing the deed. And the entries in a book containing a record of the proceedings of the society produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the defendant, after he has been proved to be a member of the society. *Alderson and another v. Clay*, 1 Starkie, 405.

464. Although notice has been given to the plaintiffs to produce certain letters, the defendant cannot cross-examine the plaintiff's witnesses as to their contents. *Graham and others v. Dyster*, 2 Stark. 21.

465. *A.*, as surety for *B.*, binds himself to pay to *C.* the balance of account between *B.* and *C.*, within the space of six months after notice. In an action by *C.* against *A.*, parol evidence of such notice cannot be given, without proof of the usual notice to produce it. *Grove and another v. Ware*, 2 Starkie, 174.

466. The legal effect of a bill of exchange cannot be controlled by a verbal condition; therefore, where it was verbally understood between the acceptor and payee of a bill that the bill should be paid out of a particular fund, that does not control the legal operation of the bill. *Campbell v. Hodgson*, 1 Gow. 74.

467. After a notice to produce a lease, and a nonsuit on the trial of the cause, the defendant assigns the lease without the privity of his attorney on record, a second action is afterwards brought, and another notice to produce the lease is served upon the attorney, who informs the person serving the notice that the lease had been assigned, and that the assignment was made without his privity, the plaintiff being acquainted with the place of the defendant's residence: held, that it was incumbent upon him to have enquired of the defendant in whose possession the lease was, in order to render secondary evidence of its contents admissible. *Knight v. Martin*, 1 Gow. 103.

468. An usage of trade cannot be set up to contravene an express contract; therefore, where *A.* agreed to sell to *B.* a quantity of bacon, which he warranted to be of a particular quality, part of which *B.* weighed and examined upon delivery at the wharfinger's, and paid for the whole by a bill at two months; but before the bill became due, gave notice to *A.* that the bacon was not agreeable to the contract: held, that *B.* could not give in evidence, a custom in the bacon-trade that the buyer was bound to reject the contract, if dissatisfied therewith, at the time of examining the commodity; and that having neglected to do so in the first instance, he was excluded from future objections. *Yeats v. Pim*, 1 Holt, 95.

## Particular of demand.

469. A particular of demand, given in under a judge's order, cannot be used as evidence of the adversary's demand. *Miller v. Johnson*, 2 Esp. C. 602.

## Partnership.

470. To establish a partnership between two defendants, a verdict on an issue directed by the court of exchequer to try that fact, is evidence for the plaintiff. *Whately v. Menheim and another*, 2 Esp. C. 608.

471. In an action against two for repairing an article, proof that it had been used on the joint account of both, is evidence of a joint ownership. *Weaver v. Prentice and another*, 1 Esp. C. 369.

472. *A.* and *B.* are partners, and part-owners of a vessel; an admission by *A.* as to a subject of co-part-ownership, but not of co-partnership, is not binding on *B.* *Jaggers v. Binnings and another*, 1 Starkie, 64.

473. Goods are supplied to *A.* and *B.* (who are partners), after notice by *A.* that he will not be answerable for any goods subsequently sent; it is incumbent on the plaintiff, in an action for the price of such goods, to prove some act of adoption on the part of *A.*, or that he has derived benefit from the goods. *Willis v. Dyson*, 1 Starkie, 164.

474. In action by partners, it is not sufficient to prove the several surnames, without proving also the Christian names of the members of the firm, as stated in the declaration. *Acerro and others v. Petroni*, 1 Starkie, 100.

475. In an action against the drawers of a bill of exchange, drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn; and in such action it is unnecessary to prove that the drawers had notice of the bill being dishonoured. *Porthouse v. Parker*, 1 Camp. 82.

476. An authority to execute a deed must be by deed; and if one partner acknowledge that he gave another partner authority to execute a deed for him, the presumption is that it was a legal authority, which must be under seal and produced. An acknowledgement is not sufficient. *Steiglitz and another v. Egginton and others*, 1 Holt, 141.

477. In an action of *assumpsit* against one partner, evidence may be given of the admission of another. *Thwaites v. Richardson, Peake*, 16.

478. *Prima facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner. *Nicholls v. Dowding and another*, 1 Starkie, 81.

479. *A.* knows that an intention between *B.* and *C.* to dissolve their partnership is in the course of execution; if *A.* afterwards insists upon the continuance of the partnership, it lies upon him to show that the intention has been abandoned. *Paterson v. Zachariah and another*, 1 Starkie, 71.

480. Notice by a co-partner that the partnership has been dissolved, is evidence as against him that it has been dissolved by competent means; and therefore is evidence of a dissolution by deed, if a deed be essential to such dissolution. *Doe v. Miles*, 1 Starkie, 181.

481. Proof of the insertion of a notice of the dissolution of a partnership, although but once, in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury without strict proof that the paper ever reached the party; but the most usual and prudent

dent course in such cases is to give notice by a circular letter. *Jenkins and another v. Blizzard and another*, 1 Starkie, 418.

482. A transfer of stock is evidence on a plea of payment to an action on a bond. *Breton v. Cope*, Peake, 41. Payment.

483. Where a creditor, having received the note or bill of a third person in payment of his debt, sues his debtor, the proof that the instrument was dishonoured and due notice given, lies upon him. *Stedman v. Gooch*, 1 Esp. N. P. C. 3.

484. Where issue is taken upon fact of payment, the manner of the payment is not in question; thus, where issue is taken upon the averment that the consideration of an annuity stated in the memorial to have been paid, was not paid. *Franco v. Lindo*, 1 Esp. C. 300.

485. Payment of a banker's check given by the defendant to the plaintiff, is evidence of the payment of his demand. *Egg v. Barnett*, 3 Esp. C. 196.

486. Payment of a note of hand payable after sight may be presumed after the lapse of twenty years from the date. *Duffield v. Creed*, 5 Esp. C. 52.

487. The presumption arising from lapse of time of a judgment being satisfied, is not rebutted by evidence of the defendant having been in extremely embarrassed circumstances, and, in the opinion of those who knew him, incapable of paying the debt secured by the judgment. *Willaume v. Gorges*, 1 Camp. 217.

488. Where there is a competition of evidence upon the question whether a security has been satisfied by payment, the possession of that security by the claimant ought to turn the scale. *Brembridge v. Osborne*, 1 Starkie, 374.

489. *Assumpsit*, and plea of set-off for money lent by the defendant to the plaintiff; replication denying the set-off. It appears that the loan took place thirteen years ago. Although the statute of limitations is not a legal bar to the action, the jury may presume from length of time, and other circumstances, that the debt has been satisfied. *Cooper v. Dame Turner, widow*, 2 Starkie, 497.

490. Payment of money into court on the whole declaration, in an action on an agreement, is such an admission of the agreement that it may be read without further proof. *Guillod v. Nock*, 1 Esp. C. 347. Payment of money into court.

491. An infant, after paying money into court, may still insist on his infancy as to residue of the demand, since the money paid in may be for necessities. *Hitchcock v. Tyson*, 2 Esp. C. 481. n.

492. The plaintiff may be nonsuited, notwithstanding the defendant has paid money into court. *Smith v. Vale*, 2 Esp. C. 607.

493. Where money is paid into court generally upon a declaration in contract, it admits the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties; as in the case where *A.* sues *B.* as for the sale of goods, which in point of fact were taken tortiously. *Bennett v. Francis*, 4 Esp. C. 28.; S. C. 2 B. & P. 550.

494. In an action on a valued policy of insurance, the payment of money into court upon a count which states a total loss, and the plaintiff is bound to prove that he has suffered damage from the capture beyond the amount of the sum paid into court. *Rucker v. Palsgrave*, 1 Camp. 557.

495. Proof of the rule to pay money into court will entitle the plaintiff to a verdict with nominal damages; unless the defendant prove that he has paid the costs under the rule, pursuant to the master's allocatur. *Horsburgh v. Orme*, 1 Camp. 558. n.

496. So,

496. So, if after action brought the money sought to be recovered is paid without a rule of court, the plaintiff must have a verdict. *Atkinson v. Thornton*, 1 Camp. 559. n.

497. In *indebitatus assumpsit* for goods sold, payment of money into court, after a particular stating that the action is brought for the price of a certain lot of goods sold to the defendant on such a day by *A. B.*, the plaintiff's broker does not admit that the goods purchased by the defendant of *A. B.* on the day specified were the property of the plaintiff. *Blackburn v. Scholes*, 2 Camp. 341.

498. In an action of covenant, if money be paid into court on any one of the breaches, it is unnecessary to prove the deed. *Randall v. Lynch*, 2 Camp. 356.

499. Goods having been sold to the defendant by sample at a stipulated price, he cannot, after payment of money into court in an action of *indebitatus assumpsit* insist upon any defect in the goods, since, by the payment of money into court, he admits the original contract; if a purchaser means to insist on such an objection, he ought to return the goods. *Leggett v. Cooper*, 2 Starkie, 103.

500. Payment of money into court can only be proved by the rule for paying it in. *Israel v. Benjamin*, 3 Camp. 41.

501. The taking money out of court is not conclusive as to the real extent of the plaintiff's demand. *Hildyard v. Blowers*, 5 Esp. C. 69.

## Perjury.

502. In an indictment for perjury committed on the trial of a former cause, the prosecutor should be prepared to prove the *whole* of the defendant's evidence. *Rex v. Jones, Peake*, 38.

503. Though to support an indictment for perjury committed on a former trial, the prosecutor must in general prove the whole of the defendant's examination, yet where the perjury was committed in swearing to a fact not connected with the general merits of the cause, proof of the cross-examination only is sufficient. *Rex v. Dowlin, Peake*, 170.

504. On an indictment for perjury in an answer to a bill in chancery, it is sufficient evidence of the defendant having sworn to the truth of the answer to prove his signature to it, and the signature of the master in chancery before whom it purports to be sworn. *Rex v. Benson*, 2 Camp. 508.

## Pew.

505. In an action for disturbing plaintiff's enjoyment of a pew claimed in right of a messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage (under whom plaintiff claims), in consideration of his using it, is admissible evidence to prove the plaintiff's right to the pew. *Price v. Littlewood*, 3 Camp. 288.

## Physician.

506. In an action on 14 G. 3. c. 49. by the treasurer of the college of physicians, to prove his right to sue in that capacity, it is enough to put in the annals of the *Comitia Majora*, recording his appointment, and to show that he afterwards acted as treasurer, without calling any one who was present at the election. *Budd v. Foulks*, 3 Camp. 405.

## Possession.

507. Evidence of a general perception of rent of the tenements of which those demanded formed part, held to be sufficient proof of possession to support a fine levied with proclamations against the plea *quod partis finis nil habuerunt*, &c., so as to bar the heir who never made actual entry after the death of his ancestor. *Hardman v. Clegg*, 1 Hott. 657.

## Post.

508. It is not sufficient *prima facie* evidence of a letter being sent by

by the post, that it was written by a merchant in his counting-house, and put down upon a table for the purpose of being carried from thence to the post-office, and that by the course of business in the counting-house all letters deposited on this table are carried to the post-office by a porter. *Hetherington v. Kemp*, 4 Camp. 193.

509. The *postea* by itself, without proof of the judgment thereon, is evidence of a verdict for the sum indorsed, and therefore of the debt. *Garland v. Scoones*, 2 Esp. C. 648. Postea.

510. In an action by one defendant in *assumpsit* against a co-defendant, the *postea* is evidence to prove the amount of the damages; but (*semble*) the indorsement of the costs with the master's *allocatur* on the *postea* is not sufficient to entitle the plaintiff to recover half of the costs, without producing the judgment. *Foster v. Compton*, 2 Starkie, 364.

511. After the existence of an appointment or other fact has been shown, its continuance will be presumed until the contrary appear. *Rex v. Budd*, 5 Esp. C. 230. Presumption.

512. Where there has been no fraud on the part of the defendant, the presumption of law is against the demand of the plaintiff. *Clunnes v. Pezzey*, 1 Camp. 8.

513. On proof that goods which cannot be exported without a licence, were entered for exportation at the custom-house, it will be presumed that there was a licence to export them. *Van Omeron v. Dowick*, 2 Camp. 44.

514. In an action by the assignees of a bankrupt, upon proof that the petitioning creditor's debt once existed, the law will presume that it continued down to the time of the bankruptcy. *Jackson v. Irvin*, 2 Camp. 50.

515. Under a plea of coverture, where it appeared that the defendant's husband went abroad twelve years ago. Held, that she was bound to prove that he was alive within seven years. *Howell v. De Pinna*, 2 Camp. 113.

516. If a person who is not a modeller or statuary exposes to sale a pirated bust, this is not presumptive evidence of his having made it. *Gahagan v. Cooper*, 3 Camp. 115.

517. Proof that the plaintiff wrote a letter to the defendant, purporting to contain a bill of exchange, with directions how the product should be applied, and that the defendant soon afterwards had a bill in his possession, which answered the description contained in the letter, affords presumptive evidence that both the letter and the bill found their way to the defendant. *Kieran v. Johnson and another*, 1 Starkie, 109.

518. Where a vessel is proved to have sailed, and has not been heard of for two or three years, it is to be presumed that she is lost, but at what time an individual who sailed on board of such vessel perished, is to be collected by the jury from the particular circumstances of the case. *Watson and wife v. King*, 1 Starkie, 121.

519. It is to be presumed, that a broker who has bought goods for his principal, has done every thing requisite according to the usual course of dealing for the completion of the purchase. *Boville and another v. Bradbury*, 1 Starkie, 136.

520. If the agent to whom goods have been consigned by his principal for sale, refuse, after a reasonable time has elapsed, to account for them, it is to be presumed that the agent has sold them; and in such case a bill of particulars, stating the demand to be for the



goods (which it specifies), and for money had and received, &c., is sufficient. *Hunter v. Welsh*, 1 Starkie, 224.

521. The question being, whether a piece of cloth has been returned by the defendant to the plaintiff, the production of a note by the defendant, in which the plaintiff requests him to return the piece by the bearer, is *prima facie* evidence to show that the piece has been returned; and the plaintiff ought to call the bearer of the note to show that the piece had not been returned through him. *Shepherd v. Currie*, 1 Starkie, 454.

522. In a declaration for keeping a dog which killed several of the plaintiff's sheep, it is alleged that the defendant knew that the dog was accustomed to bite and kill sheep: Proof must be given that the dog had previously bit sheep; and the fact cannot be inferred from the circumstance of the dog's having before sprung upon a man. *Hartley v. Halliwell*, 2 Starkie, 212.

523. There is no fixed rule of law with regard to the time after which a missing ship shall be reputed to be lost. It is in all cases a question of presumption, to be governed by the circumstances of the particular case. *Houstman v. Thornton*, 1 Holt, 242.

Production of  
writings

524. In trespass for seizing the plaintiff's ship, *Lord Kenyon* permitted a witness served with a *subpœna duces tecum* by the plaintiff, to withhold a warrant of attorney. *Miles and another v. Dawson*, 1 Esp. C. 405.

525. Notice to produce papers must be given a reasonable time before trial. *Sims v. Kitchen*, 5 Esp. C. 46.

526. The solicitor to a commission of bankruptcy is bound to produce them when served with a *subpœna*. *Pearson v. Fletcher*, 5 Esp. C. 91.

527. A party served with a *subpœna duces tecum* is bound to have the writings at the trial ready to be produced in whatever way he came by them: *Amey v. Long*, 6 Esp. C. 116.; S. C. 9 East, 485.

528. Although a paper may be in the legal custody of A., if it is in the actual possession of B., he is bound to produce it under a *subpœna duces tecum*. *Amey v. Long*, 1 Camp. 14. 180 a.

529. If, upon a notice to produce books of account, they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. *Cooper and another v. Gibbons*, 3 Camp. 363.

530. A solicitor to a third person is bound to produce his client's lease executed by the defendant, provided the production will not operate to the prejudice of his client. But if the reading of such a document would operate to the prejudice of a third person, the court will *not* direct it to be read. *Copeland v. Wattss and another*, 1 Starkie, 95.

531. Service of notice on the wife of the defendant's attorney at his lodgings to produce a lease, on the evening before trial, is insufficient. *Doe ex dem. Wartney v. Grey*, 1 Starkie, 283.

532. Notice to the defendant to produce an order relating to the ship which it appears the defendant has delivered to the captain, is sufficient, on default of production, to entitle the plaintiffs to give parol evidence of the order, since the possession of the captain is for this purpose the possession of the defendant. *Baldney and another v. Ritchie*, 1 Starkie, 338.

533. Upon a *subpœna duces tecum* a witness is bound to produce a paper which he has in his actual custody, though the legal right and

property in such paper belong to another. The court, however, in all such cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications, as respects the interest of the witness. Such witness is bound to produce them, though there be a regular way prescribed by law for obtaining such documents. *Corse v. Dubois*, 1 Holt.

534. In an action for repairing a cart, an entry in the books of the receiver of duties on carts, is not evidence of property in the defendant, without proof that it was made at his instance. *Weaver v. Prentice* and another, 1 Esp. C. 369. Property.

535. Acts of ownership are conclusive evidence of property against supposed unexercised rights. *Curzon and another v. Lomax*, 5 Esp. C. 60.

536. In trover for bank-notes, to prove that they belonged to the plaintiff, the evidence was, that they had been delivered out by a banker's clerk (to what person he could not tell) in payment of a cheque which was payable to the plaintiff or bearer. This held to be *prima facie* evidence of property. *Greenstreet v. Carr*, 1 Camp. 551.

537. Possession is *prima facie* evidence of property in negotiable instruments. Therefore, in trover for a bank-note, it is not a *prima facie* case for the plaintiff to prove that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to show his title to the note, without evidence from the other side that he got possession of it *mala fide*, or without consideration. *King v. Milsom*, 2 Camp. 5.

538. In an action for rent, to entitle the tenant to deduct the property tax, it is sufficient to prove the payments to the collector, without producing the assessments. *Philips v. Beer*, 4 Camp. 266. Property tax.

539. A record is conclusive of those matters only which appear upon the face of it, and not by collateral evidence, to have been litigated. *Sintzenick v. Lucas*, 1 Esp. N. P. C. 44. Record.

540. To prove an examined copy of a record, it is sufficient for a witness to swear, that he examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. *Giles v. Hill*, 1 Camp. 471 n. S. P.

541. Before a document can be read as a record, it must be proved either that it came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it professes to be a record, and the contents of the document itself cannot be called in aid in support of such proof. *Adamthwaite v. Synge*, 1 Starkie, 183.

542. The inspection of a record is within the peculiar province of the court; and therefore if a doubt arise as to any word upon a record, the court, and not the jury, must resolve that doubt. *Rex v. Hucks*, 1 Starkie, 521.

543. It is evidence of the insufficiency of pledges in *replevin*, that they have made default in the payment of debts which they had promised, on application, to discharge. *Gwyllim v. Scholey* and another, 6 Esp. C. 100. Replevin.

544. In *replevin*, the declarations of the person under whom the defendant makes cognizance, are not evidence for the plaintiff. *Hark v. Horn*, 2 Camp. 92.

545. If the abandonment of a contract be made the ground of an action, it is not competent to the plaintiff to show that a contract has existed and been abandoned, without proving the specific contract. *Walker v. Constable*, 2 Esp. C. 659; 5 C. 1 B. & P. 306. Rescinding contracts.

Rescinding  
payments.

546. In an action for money had and received, to recover back money paid to the defendant, it is not necessary to show that he knew he was not entitled to receive it. *Robinson v. Anderton, Peake*, 94.

Schedule.

547. It is matter of evidence whether certain goods are those mentioned in a notice or schedule. *Holsten v. Jumpson*, 4 Esp. C. 189.

Seamen's  
wages.

548. The statute 2 G. 2. c. 26., exempting seamen from producing the written agreement for wages, only applies to actions for wages; not therefore to an action by a seaman against the master for a wrongful act which prevented him from earning his wages. *Johnson v. Lewellin*, 6 Esp. C. 101.

549. In an action for seamen's wages, the plaintiff may, under 2 G. 2. c. 36., give evidence of the contents of the ship's articles, without having served a notice to produce them. *Bowman v. Mauzelman*, 2 Camp. 315.

550. Held, that on a count for work and labour, a seaman might recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew were restored to the ship, and that she completed the voyage and earned freight, without producing the order by which the embargo was taken off. *Delamainer v. Winteringham*, 4 Camp. 186.

Seduction.

551. In an action for the seduction of a daughter, the plaintiff may prove, in addition to the loss of service, the extent of her sufferings and loss as a parent. *Bedford v. M'Cowl*, 3 Esp. C. 119.

552. In an action for seducing the plaintiff's daughter, *per quod servitium amisit*, the plaintiff cannot examine witnesses to the daughter's general character, except in answer to evidence of general bad character adduced on the part of the defendant. *Bamfield v. Massey*, 1 Camp. 460.

553. In an action for seducing the plaintiff's daughter, evidence cannot be admitted that the defendant accomplished the seduction by means of a promise of marriage. *Dodd v. Norris*, 3 Camp. 519.

554. In an action brought by a parent for the seduction of his daughter, it is not necessary to sustain the action, that the daughter should be produced as a witness at the trial. *Farmer v. Joseph*, 1 Holt, 451.

Set-off.

555. Where to debt on bond the defendant pleaded, that 1100*l.* was due and no more, and undertook to discharge himself therefrom by a set-off; and the plaintiff replied generally, that a larger sum was due, to wit, the sum 1750*l.* Held, that the plaintiff was bound to prove, that more than 1100*l.* was due. *Bell v. Shaw*, 1 Holt, 293.

Sheriff.

556. Evidence that the original defendant acknowledged the debt, is admissible in an action against the sheriff for a false return. *Kemp-land v. Macauley, Peake* 65.

557. To connect the sheriff with his bailiff, it is sufficient to prove (by an office copy), the writ, return and indorsement of the bailiff's name thereon, and that it is the practice of the sheriff's office to indorse the writ with the name of the bailiff to whom the warrant was delivered. *M'Neil v. Perchard and another*, 1 Esp. C. 263.

558. In an action against the sheriff for a false return to a *f. fa.*, to prove that a bill of sale by the debtor was fraudulent, his declaration at the time of executing it are admissible, but not those subsequent to the execution. *Phillips v. Eamer and another*, 1 Esp. C. 357.

559. An indorsement by a sheriff's officer on his warrant is evidence

dence against his surety sued by the sheriff, without calling the officer himself. *Perchard and another v. Tindall*, 1 Esp. C. 394.

560. Proof that the party of whom the sheriff has returned *non est invent.* might have been arrested, is sufficient in an action for a false return. *Beckford v. Montague*, 2 Esp. 475.

561. In an action against the sheriff for an escape, the same evidence of the demand, that would be sufficient against the party escaping, is sufficient against the sheriff. *Sloman v. Herne*, 2 Esp. C. 695.

562. A bill of sale executed by the sheriff, reciting the writ, seizure, and sale of the property, is sufficient to charge him in trespass for taking it. *Woodward v. Larking*, 3 Esp. C. 286.

563. In an action of trespass against the sheriff for seizing the plaintiff's goods, to connect the defendant with the trespass, it is sufficient to prove the warrant under which the goods were seized by the bailiff. *Grey v. Smith*, 1 Camp. 387.

564. In an action against the sheriff for a false return to a writ, what was said by the bailiff, to whom the warrant under it was directed, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it? — is evidence against the sheriff. *North v. Miles*, 1 Camp. 389.

565. So of what the bailiff says, when, after arresting the person named in the writ, he takes him into another county. *Bowsher v. Calley*, 1 Camp. 391. n.

566. In an action against the sheriff for not arresting a person on *mesne* process, notice of this person being within the defendant's bailiwick given to the undersheriff's agent in London, is no evidence of such notice to the defendant. *Gibbon v. Coggon*, 2 Camp. 189.

567. In an action against the sheriff for a false return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to show that this officer's name is written in the margin of the examined copy of the writ and return. But without producing the warrant, it was held to be enough to give in evidence a paper issued by the sheriff's office and directed to this officer, requiring him to give instructions for making a return to the writ. *Jones v. Wood and another*, 3 Camp. 228.

568. In an action against the sheriff for an escape upon *mesne* process, it is enough, without producing the warrant, or giving direct evidence of the arrest or escape, to prove the sheriff's return of *cepi corpus*, and to show that the party did not put in bail, and was not in the sheriff's custody at the return of the writ. *Fairlie v. Birch and another*, 3 Camp. 397.

569. In order to charge the sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept with the bailiff's name indorsed upon it, although the sheriff has returned *cepi corpus*; the plaintiff, in such case, must either produce the warrant, or prove some recognition of the act of the bailiff by the sheriff. But it is not essential, in such case, to produce the warrant; the privity between the sheriff and the bailiff may be proved by showing that, upon the arrest, a bail bond was executed and delivered to the bailiff, who returned it to the sheriff, upon which the latter made his return of *cepi corpus*. *Martin v. Bell and another*, 1 Starkie, 413.

570. In an action against the sheriff for an escape on *mesne* process, an admission by the defendant in the former action as to his liability is evidence against the sheriff. *Wilson v. Bridges*, 2 Starkie, 42.

571. In an action against the sheriff, in order to connect him with the act of his bailiff, it is sufficient to produce the writ, with the name of the bailiff indorsed upon it, in the sheriff's office, it being the course, in the sheriff's office, to indorse upon the writ the name of the bailiff by whom it is to be executed. *Tealby v. Gascoigne*, 2 Starkie, 202.

572. In an action against the sheriff for an escape, the regular way of connecting him with his officer, so as to make him responsible for his act, is by the production of the warrant. But any recognition by the sheriff, that the officer acted under his authority, will dispense with the necessity of producing it. An indorsement upon the writ (returned and filed by the sheriff) of the name of the officer, is not sufficient to make the sheriff responsible, without proving that his name was written upon it by the authority, or with the privity of the sheriff. The writ, with the sheriff's return upon it, is only evidence against him, to the extent of his duty under it, and it is no part of his duty to annex the officer's name to the return. *Hill v. Leigh* and another, 1 Holt, 217.

573. In an action against a sheriff for a false return of *nulla bona*, it is sufficient for him to show that, before execution executed, a writ of error was allowed, although the levy was made before notice of the allowance, since the writ of error operated as a *supersedeas* from the time of its allowance. And notwithstanding the levy was made before notice of the allowance, yet the return of *nulla bona* is unobjectionable, since after the allowance the levy could not legally have been made. *Cleghorn v. Desanges*, 1 Gow. 66.

Ship.

574. In an action on st. 37 Geo. 3. c. 73. against the master of one ship for knowingly retaining a deserter from another, if it appears that the deserter was serving in his own ship under articles, they must be produced by the plaintiff. *Martin v. Greenleaf*, 2 Esp. C. 729.

575. The register of a ship then registered for the first time is evidence of property, without proving how the party became entitled to her. *Woodward v. Larking*, 3 Esp. C. 287.

576. Directions to the captain to go on board and take command of the vessel, pay the seamen, and draw bills on the party for the use of the vessel, are evidence of sole ownership. *Marsh v. Robinson*, 4 Esp. C. 99.

577. The register of a ship is not by itself sufficient proof of ownership to charge one as owner. *Ditchburn v. Spracklin and others*, 5 Esp. C. 31.

578. To prove that *A.* is liable as a registered owner of a ship, entries in the custom-house books of the port of London, and of the out port to which the ship belongs, stating that she was transferred to *A.* by *B.*, the original owner, are not sufficient evidence. *Frazer v. Hopkins*, 2 Camp. 171.

579. In an action against several defendants for stores supplied to a ship by order of the captain, the register obtained on the oath of one of the defendants is *prima facie* evidence of ownership against all. *Stokes v. Carne*, 2 Camp. 339.

580. In an action for stores supplied to a ship, if the defendant pleads in abatement, that he is only liable jointly with others, it is not enough for him to produce the ship's register containing the names of himself and those others as owners of the ship. *Flower v. Young*, 3 Camp. 240.

581. In an action against the owner of a ship for stores supplied to

to her, the register purporting to be granted on the oath of the defendant, and stating him to be sole owner, is no evidence of ownership. *Smith v. Fuge*, 3 Camp. 456.

582. To prove that a ship is British built, a British register so describing her is by itself no evidence. *Reusse v. Meyers*, 3 Camp. 475.

583. An entry in the register-book at the custom-house, stating that a certificate of register was granted on an affidavit by *A.* that he was an owner, held not admissible as secondary evidence of ownership against *A.*, although all the affidavits on which registers had been granted were burnt at the custom-house. *Teed v. Martin and others*, 4 Camp. 90.

584. In an action against the owners of a ship, it is sufficient *prima facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners; without further proof of agency. *Marshall and another v. Cliff and another*, 4 Camp. 133.

585. In an action against the owner of a ship for money supplied to the captain at a foreign port, it is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of part of that sum to such uses, and that the residue was placed to the private account of the captain. It is essential to prove the advance of a specific sum, that it was necessary for the use of the ship, and that it was so applied in fact. *Palmer v. Gooch*, 2 Starkie, 428.

586. To charge the owners of a ship with money advanced to the captain in a foreign country, the plaintiff must show that it was necessary to borrow the money, and must prove the actual application of it. Where the paper in which a party charges himself with the receipt of money, likewise contains a discharge of it, it is not admissible in evidence. *Bogle v. Atty*, 1 Gow. 50.

587. The muster roll of a ship's company is not evidence of the death of a particular person without proof of identity. *Barber v. Holmes*, 3 Esp. C. 190. Ship muster roll.

588. In an action for words spoken to *A.* concerning the plaintiff, evidence of words (not themselves actionable) spoken to *B.*, may be received to show the malice of the defendant. *Mead v. Daubigny, Peake*, 125. Slander.

589. Where an attorney sues for defamatory words spoken with reference to his conduct in a cause, the proceedings therein must be proved, (*i. e.* by a copy of the roll.) *Parry v. Coles*, 1 Esp. C. 399.

590. In an action for slander other words besides those laid in the declaration may be given in evidence to heighten the malice, unless in themselves actionable. *Cook v. Field*, 3 T. A. 133.

591. Where slander implies a charge, that the plaintiff was not qualified to act in the particular character which he assumed, he ought to prove his qualification, and it will not be sufficient to show that he acted in that capacity. *Moises v. Thornton*, 3 Esp. C. 4; S. C. 8. T. R. 303.

592. In an action for defamation of the plaintiff's general character, evidence of general good character is admissible. *King v. Waring and wife*, 5 Esp. C. 13.

593. When actionable words laid in the declaration are proved, other words actionable in themselves may be given in evidence, to show *quo animo*, the former were spoken. *Russel v. Macquister*. 1 Camp. 49. n.

594. In an action for words of perjury, to show the *quo animo*, the plaintiff may give in evidence a bill of indictment subsequently preferred by the defendant against him, and which the grand jury returned *ignoramus*. *Tate v. Humphrey*, 2 Camp. 73. n.

595. In an action for words, which may be understood to convey a charge either of felony or fraud; although they would be actionable in the latter sense, as well as the former, if the declaration contains an inuendo, that the defendant thereby meant to impute felony to the plaintiff; this is material and must be made out in evidence. *Smith v. Carey*, 3 Camp. 461.

596. In an action for slander, words are given in evidence in order to prove malice which are not stated in the declaration, the defendant may prove the truth of such words. *Warne v. Chadwell*, 2 Starkie, 457.

597. In an action for slander, it is not competent for the defendant, under the general issue, to offer, in mitigation of damages, evidence that the specific facts in which the slander consists, and for which the action is brought, were communicated to him by a third person. *Mills v. Spencer*, 1 Holt, 533.

Stamp.

598. It seems that an indorsement by a sheriff's officer on his warrant that he has received the levy money, is evidence of the fact without being stamped as a receipt. *Perchard and another v. Tindall*, 1 Esp. C. 396.

599. Goods consigned to *A.*, upon their arrival, are landed on the defendant's wharf; the plaintiff, in an action of trover, may prove his title by parol, although the bill of lading which has been indorsed to him cannot be received in evidence for want of a stamp. *Davis v. Reynolds*, 1 Starkie, 115.

600. The plaintiff having signified, by a printed prospectus, the terms on which he is ready to engage to perform particular services, may, in an action against one who has employed him to render those services under a parol agreement, read the printed prospectus to show what the terms were, although it is not stamped. *Edgar v. Blick*, 1 Starkie, 464.

601. In an action for work and labour, a proposal on the part of the defendant, which was not finally acceded to, containing an estimate of the amount of the work, may be read in evidence by the defendant, although it be not stamped. *Peniford v. Hamilton*, 2 Starkie, 475.

Stock.

602. In an action for not accepting stock agreed to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock which he refused, can only be satisfied by showing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the transfer was to be made, until the close of the transfer books, which was the latest time when the transfer could be made. *Bourdenave v. Gregory*, 5 Esp. C. 115; S. C. 5 East, 107.

603. *Semble*, That in an action for not accepting stock, it is not necessary by the statute 7 Geo. 2. c. 8. s. 6., for the plaintiff to show that he transferred the stock to another at the next possible transfer day after default made by the original contractor, provided the stock were transferred before the action brought; though if the plaintiff might have obtained more for the stock by a sale on any intermediate day between the original default and the actual sale, that will go in reduction of the damages sustained by the plaintiff by such default. *Bourdenave v. Gregory*, 5 Esp. C. 115; S. C. 5 East, 107.

604. In an action against a surety, the principal's admissions are evidence against him. *Perchard and another v. Tindall*, 1 Esp. C. 395. Surety.

605. In an action on a guarantee for the debt of a third person, signed by one of two partners in the partnership firm, it is necessary to give some evidence beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by the guarantee. But for this purpose it would be sufficient to prove a parol acknowledgment from the other partner subsequently to the giving of the guarantee, or to show a previous course of dealing, in which similar guarantees had been given in the partnership firm with the privity of both partners. *Duncan v. Lowndes and another*, 3 Camp. 478.

606. Where a declaration avers that an action was depending, and upon which fact the plaintiff's right of suit depends, it must be proved. *Parry v. Collis*, 1 Esp. C. 399; *Herbert v. Jones*, Id. 442. Surplusage.

607. A promise to pay the debt of another, need not be proved to be in writing, when the defendant pleads a tender to the count on such promise. *Middleton v. Brewer, Peake*, 15. Tender.

608. In an action on 5 Eliz. c. 4., for setting to work in a trade, a person who has not served an apprenticeship, if the trade is not enumerated in the statute, some evidence must be given that it was known and practised in England when the act passed. *Martins v. Galloway*, 3 Camp. 121. Trade.

609. A great number of placards, announcing a public meeting in Spa Fields, having been printed, the prisoner takes twenty-five of them away from the printer's, one of the remaining placards may be read without any preparatory evidence as to the original manuscript, and without notice to the prisoner to produce the twenty-five copies. *Rex v. Watson*, 2 Starkie, 129. Treason.

610. Evidence admitted of a seditious speech spoken by the prisoner, although not set out in substance as an overt act. *Rex v. Watson*, 2 Starkie, 132.

611. In treason and felony, evidence may be given of the finding articles secreted, although they were found at a time subsequent to the prisoner's apprehension. *Rex v. Watson*, 2 Starkie, 137.

612. Papers found in the lodgings of a co-conspirator, at a period subsequent to the apprehension of the prisoner, may be read in evidence, although no absolute proof be given of their previous existence, where strong presumption exists, that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers are immediately connected with the objects of the conspiracy as detailed in evidence. *Rex v. Watson*, 2 Starkie, 140.

613. *Quære*. Whether seditious questions and answers found in the possession of a co-conspirator, but not published, may not, from their close connection with the nature and object of the conspiracy, be read in evidence, although no positive and direct proof be given that use was to be made of this or any other such instrument in furtherance of the design. If such positive evidence were to be given, the document would certainly be admissible. *Rex v. Watson*, 2 Starkie, 141.

614. In trespass *q. c. f.*, the defence is that *M. P.* was the owner of the *locus in quo*, and that the defendant entered by the direction of *M. P.*, a declaration by *M. P.* made subsequent to the act complained of, is inadmissible. *Garr and another v. Fletcher*. 2 Starkie, 71. Trespass.



Trial.

615. Proof of notice of trial may be, by producing the issue with notice indorsed and proving delivery of the issue; but not by parol. *Thomas v. Ansley* and another, 6 Esp. C. 80.

Trove.

616. A demand in writing left at the defendant's house, and a non-compliance therewith, are sufficient evidence of a conversion in trover. *Logan v. Houlditch* and others, 1 Esp. N. P. C. 22.

617. If *A.* sends goods by *B.*, a common carrier, to be delivered to *C.*, proof that *B.* asserted he had delivered the goods to *C.*, whereas in truth *C.* had never received them, is not sufficient evidence of conversion to support trover against *B.* *Attersol v. Briant*, 1 Camp. 409.

618. In trover for a deed, the evidence of conversion was, that when the deed was demanded from the defendant, he said, he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it. This held sufficient. *Smith v. Young*, 1 Camp. 489.

619. If *A.* claiming goods under a fraudulent bill of sale from *B.*, bring trover against *C.*, for taking them in execution as belonging to *B.*, *C.* must prove the judgment against *B.*, although the sale from *B.* to *A.* was merely colourable and void as against creditors. *Steel v. Brown*, 1 Camp. 512. n.

620. Refusal to deliver goods by person ignorant of real owner no evidence of conversion. *Green v. Dunn*, 3 Camp. 215.

621. Proof that the defendant in trover stated that he sold the property in question on the plaintiff's account, is not *prima facie* evidence of a conversion. *English v. Charters*, 2 Starkie, 30.

622. In an action of trover against the defendant for not delivering some wine deposited with her, by way of security for an advance of money, held that it was not sufficient evidence of a conversion to show, that her son, who acted as her general agent, refused to give it up, and that it was necessary to prove, that such agent acted under a special direction in order to make the defendant liable. *Pothonier and another v. Dawson*, 1 Holt, 383.

623. In trover for a landau, proof of a demand of the landau and non-delivery in pursuance of it, is evidence of a conversion. *Watkins v. Woolley*, 1 Gow. 69.

Usury.

624. An account in the hand writing of the person borrowing money, is no evidence for the lender in an action for usury brought against him by a common informer. *Maugham qui tam v. Walker, Peake*, 163.

Vendor and purchaser.

625. In suits against vendors of real property for not completing the purchase, the vendor in making out his title, need not prove the execution of deeds annexing rights appurtenant to the premises. *Thomson v. Miles*, 1 Esp. N. P. C. 185.

626. Where the vender of goods has obtained them by fraud, as against the real owner, the vender must prove that the sale was *bona fide*. *Wright v. Lawes*, 4 Esp. C. 82.

627. Where a purchaser seeks to recover back his deposit upon the grounds of a defeat of title, he must prove that the title is defective; opinions of council against it are not sufficient. *Camfield v. Gilbert*, 4 Esp. C. 221.

628. In an action for the value of an article ordered of the plaintiff by the defendant, but returned by the defendant to the plaintiff, it is incumbent on the plaintiff to prove, that it was agreeably to the order. *Hayden v. Howard*, 1 Camp. 180.

629. In an action against a vender for a deceitful representation, the

the plaintiff must prove that deceit was used by the defendant for the purpose of throwing the plaintiff off his guard, and preventing him from being vigilant. *Dawes v. King*, 1 Starkie, 75.

630. In an action for the price of clover seed sold by sample, the defendant contends that the seed delivered did not accord with the sample; before he can go in to such a defence, he must prove that he gave notice of his objection to the plaintiff. *Groning and another v. Mendham*, 1 Starkie, 257.

631. Proof that the plaintiff sent goods to the defendant resident in a foreign country, upon the order of merchants residing in London, and that the defendant received and used the goods, is *prima facie* evidence of goods sold and delivered to the defendant. *Bennett and another v. Henderson*, 2 Starkie, 550.

632. In an action of replevin between the assignees of a bankrupt (who was formerly tenant to *A.*) and the bailiff who distrained, one issue is whether the assignees are tenants to *A.* A verdict against the assignees on this issue, is afterwards conclusive as to the tenancy of the assignees in an action brought by *A.* for rent. *Hancock v. Welsh and another*, 1 Starkie, 347. Verdict.

633. A will of lands being lost, the probate is not admissible as secondary evidence of its contents. *Doe v. Calvert*, 2 Camp. 389. Will.

634. On proof that a will of lands had been lost, parol evidence of its contents may be received from a witness who heard it read over before the testator's family on the day of his funeral. 2 Camp. 390. n.

635. Although the probate of a will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the ecclesiastical court, without some indorsement upon it for the purpose of authentication. *Rex v. Barnes*, 1 Starkie, 243.

636. It is no objection to an action for not producing a paper under a *subpoena duces tecum*, that the defendant, being called as witness, had sworn at the former trial, that he had it not in his possession, and knew nothing of it. *Amey v. Long*, 1 Camp. 16. Witness.

637. If a witness answers questions to which he might have demurred as subjecting him to penalties, his answers may be used against him to all legal purposes; and therefore, in an action on 5 Geo. 2. c. 30. s. 21., the defendant's examination before the commissioners may be given in evidence, to show that by his own confession he had concealed property of the bankrupt. *Smith v. Beadnell*, 1 Camp. 30.

638. *A.* was examined before two magistrates on an information against *B.* for having smuggled spirits in his possession; and was afterwards examined on the trial of an indictment against *B.*, for assaulting revenue officers while they were attempting to seize the same spirits. On this last occasion, *A.* swore that he had always given the same account of the transaction. Held, that the record of *B.*'s conviction on the information, in which *A.*'s evidence before the magistrates was set out, was not legal evidence to contradict *A.*, by showing that he had given a different account of the transaction when first examined. *Rex v. Howe*, 1 Camp. 461.

639. The evidence which a person has given before a committee of the House of Commons, is afterwards admissible against him on a criminal charge. *Rex v. Merceron*, 2 Starkie, 366.

640. Even admitting that a clerk of the post office, or other scientific person, may be examined as to whether a handwriting is forged or Writing.

or genuine, his opinion, formed from a comparison of the writing in question with one admitted to be genuine, is inadmissible. *Stranger v. Searle*, 1 Esp. N. P. C. 14.

*Evidence.—Witness.*

- Accomplice.** 1. A person indicted for a misdemeanor, or a felony, may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex v. Jones*, 2 Camp. 132.
- Agent.** 2. A broker is a witness to prove a contract; but in an action brought against the principal for negligence and misconduct in the course of his employment in the purchase of certain bales of tobacco, the broker who made the contract for him cannot be called to prove that there was no negligence or misconduct in the execution of it, without a release from his principal. *Gevers and another v. Mainwaring*, 1 Holt, 139.
3. In an action for goods sold, a person who entered into a contract for the purchase of the goods in his own name is not a competent witness to prove that he purchased them as the agent of the defendant. *M'Brain v. Fortune and another*, 3 Camp. 317.
4. In an action for taking an excessive distress, the broker who made it is not a witness for the defendant, unless released. *Field v. Mitchell*, 6 Esp. C. 73.
5. One who has executed an instrument for another, cannot be examined touching the affair, until proof of the authority under which it was executed. *Johnson v. Mason*, 1 Esp. N. P. C. 90.
- Aiding the memory.** 6. A witness, for the purpose of refreshing his memory, may refer to entries in a book which he did not write with his own hand, but which he regularly examined, from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection. *Burrough v. Martin*, 2 Camp. 112.
7. Where the question is as to the time of an act of bankruptcy, a witness may recur to his deposition before the commissioners, to refresh his memory. *Vaughan v. Martin*, 1 Esp. C. 440.
8. A witness, having made entries, though not from original documents, may refer to them, that he may be able to state at what time a particular entry was made. *Rogers v. M'Carty*, 3 Esp. C. 106.
9. The counsel for the plaintiff may suggest to the witness called to prove the partnership of several members of a firm who are plaintiffs, the names of the component members of the firm. *Acerro and others v. Petroni*, 1 Starkie, 100.
10. In order to identify a person in court with one whom the witness has described, the attention of the witness may be directed to the person in court, and he may be asked whether that is the person of whom he has spoken. *Rex v. Watson*, 2 Starkie, 128.
- Arbitrator.** 11. An arbitrator is competent to prove admissions made before him by either party, unless with a view to a compromise. *Gregory v. Howard*, 3 Esp. C. 113.
12. In case for maliciously holding to bail, where it appeared that the original cause was referred to arbitration, and the arbitrator determined on the examination of the parties and inspection of their books, that nothing was due, he cannot be called to prove those facts. *Habershon v. Troby*, 3 Esp. C. 38.
- Attesting witness.** 13. An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is cancelled. *Breton v. Cope*, Peake, 41.

14. The execution of an attested deed can only be proved by the subscribing witness, if forthcoming, and not by the admission of the party, or one who executed for him. *Johnson v. Mason*, 1 Esp. N.P.C. 89.

15. The rule relative to the proof of attesting instruments is precisely the same, whether the instrument is the foundation of the action, or comes in collaterally as part of the evidence in the cause. *Manners v. Postan*, 4 Esp. C. 239.

16. The rule relative to the proof of attested instruments holds, even against an admission by the defendant in an answer to a bill filed against him for a discovery. *Call v. Dunning*, 5 Esp. C. 16.; S. C. 4 East, 53.

17. An attested instrument must be proved in the regular way, though produced on notice by the adverse party. *Johnson v. Lewellin*, 6 Esp. C. 101., over-ruling *Rex v. Middlezoy*, 2 T. R. 41.

18. If an attesting witness to a deed confesses *in extremis* that it is a forgery, this confession may be given in evidence to defeat the deed. 1 Camp. 210.

19. If the plaintiff declares upon a deed, and there is no plea of *non est factum*, still, if at the trial he would read any part of the deed which is not upon the record, he must prove it by the attesting witness in the usual way. *Williams v. Sills*, 2 Camp. 519.

20. If an indorsement upon a promissory note purports to have been attested by a subscribing witness, the witness must be called to prove such indorsement. *Hone v. Metcalf*, 1 Starkie, 53.

21. When a warrant to distrain has been signed by an attesting witness, that witness must be called to prove it. *Higgs v. Dixon*, 2 Starkie, 180.

22. Upon the trial of an issue whether the date of an annuity deed has not been altered, the attesting witness must be called. *Edinburgh v. Crudell*, 2 Starkie, 284.

23. An acknowledgment to an attesting witness of having executed a deed, without a formal execution in his presence, is sufficient. *Powell and another v. Blackett*, 1 Esp. N. P. C. 97.

24. In proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution. *England v. Roper*, 1 Starkie, 304.

25. In ejectment by the heir against the devisee, to prove the will the devisee need only call one of the subscribing witnesses. *Doe ex dem. Stutsbury and others v. Smith and wife*, 1 Esp. C. 391.

26. A person who sees an instrument executed, but is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. *McCraw v. Gentry*, 3 Camp. 232.

27. If the name of a fictitious person be put as a subscribing witness to a deed, proof of the party's handwriting is sufficient. *Fasset v. Brown*, Peake, 23.

28. Where the subscribing witness to an instrument denies having any knowledge of its execution, it may be proved by proving the handwriting of the party to the instrument, or by any person present at the execution, though he is not indorsed as witness, if the subscribing witness swears that the party did not execute. *Ley v. Ballard*, 3 Esp. C. 173. n.

29. *Semble*, that where the plaintiff serves the defendant with notice to produce an instrument in his possession, under which both parties claim the same interest, it is not necessary for the plaintiff to prove the execution of the instrument by the testimony of the sub-

subscribing witness. *Aliter*, where their interests are adverse. *Knight v. Martin*, 1 Gow. 26.

30. Where a subscribing witness is resident abroad, evidence of his hand-writing is to be given as if he were dead. *Holmes v. Poutin*, *Peake*, 99.

31. Where an attesting witness is not amenable to the process of the court, proof that the signature is his handwriting is evidence of the attestation and execution. *Cooper v. Martin*, 1 Esp. N. P. C. 2.

32. Where the attesting witness to an instrument on which the defendant is sued, has married the plaintiff, proof of the defendant's handwriting is sufficient. *Buckley v. Smith*, 2 Esp. C. 697.

33. What is sufficient evidence of the attesting witnesses to a deed being out of the country, to let in evidence of his handwriting. 1 Camp. 304.

34. If a deed purports to be executed by *A.* in the presence of *B.*, as attesting witness, and *B.* swears truly that it was not executed by *A.* in his presence, the deed cannot be proved by evidence of *A.*'s handwriting, or of an acknowledgement by *A.* that he had executed it. *Phipps v. Parker*, 1 Camp. 412.

35. In an action on a *post-obit* bond, it appeared that the attesting witness was an attorney, who formerly had an office in London, and resided at Sydenham. Held, that it was not enough to let in evidence of his handwriting to prove the execution of the deed, that he had disappeared from his office in London for a twelve-month before the trial, and had not been heard of during that period by persons who knew him, without showing that search had been made after him at the house he occupied at Sydenham. *Wardell v. Fermor*, 2 Camp. 282.

36. But evidence of his handwriting was admitted, on proof that a twelvemonth ago a commission of bankrupt had been sued out against him, to which he had never appeared. *Wardell v. Fermor*, 2 Camp. 282.

37. If the attesting witness to a deed swears that he did not see it executed, it may be proved by evidence of the handwriting of the party. *Fitzgerald v. Elsee*, 2 Camp. 635.

38. So, if the subscribing witness to a promissory note swears that he did not see it drawn, it may be proved by evidence of the handwriting of the maker. *Lemon v. Dean*, 2 Camp. 636 n.

39. Where an attesting witness becomes insane, the instrument may be proved by evidence of his handwriting. *Currie v. Child and others*, 3 Camp. 283.

40. It is no sufficient ground for receiving evidence of the handwriting of a witness, which would be receivable if he were dead, that he is unable to attend the trial from indisposition, and lies without hopes of recovery. *Harrison v. Blades and another*, 3 Camp. 457.

41. An attesting witness to a bond resides in Ireland; *semble*, his handwriting may be proved, although no steps have been taken to procure his personal attendance. *Hodnett v. Forman*, 1 Starkie, 90.

42. An attorney who prepares deeds which are granted on an usurious consideration, may be called as a witness to prove the usury. *Duffin v. Smith*, *Peake*, 108.

43. An attorney was admitted to prove an offer made by him on his client's authority, not with a view to a compromise, but as an admission outright. *Turner v. Railton*, 2 Esp. C. 474.

44. The rule of evidence touching confidential communications between attorney and client, holds where, though the action is between

tween third persons, the client is the party really concerned; thus, where the sheriff is sued for the client's escape. *Sloman v. Herne*, 2 Esp. C. 697.

45. The attorney of a party in the cause, if a subscribing witness to a deed, may be examined concerning the execution. *Robson and another v. Kemp and another*, 4 Esp. C. 235.; S. C. 5 Esp. C. 52.

46. An attorney cannot be examined as to any fact with which he has become acquainted only by having been entrusted as an attorney. *Robson and another v. Kemp and another*, 5 Esp. C. 52.

47. An attorney is not bound to disclose circumstances relative to a bill of exchange with which he became acquainted under his retainer. *Brard v. Ackerman*, 5 Esp. C. 120.

48. *A.* having a demand upon *B.*, *B.* before *A.* commences any action, employs *C.* his attorney to make certain propositions to *A.* upon the matters in difference between them. *C.* cannot be examined as to what *B.* said upon the occasion, for this is to be considered a privileged communication between attorney and client. But what *C.* said when he made the propositions to *A.* is good evidence against *B.*, without further proof of *C.* being authorised by him, than the fact of *C.* being his attorney. *Gainsford v. Grammar*, 2 Camp. 9.

49. An attorney is not at liberty to disclose in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cause before the court. *Rex v. Withers*, 2 Camp. 578.

50. Bail to the sheriff are incompetent witnesses for the defendant, where an attachment against the sheriff for not putting in bail stands as a security. *Piesley v. Von Esch*, 2 Esp. C. 605. Bail.

51. In an action by the sheriff on a bail-bond, the bound bailiff who made the caption is a competent witness to prove the execution of the bond, if the defendant, knowing his situation, asked him to become attesting witness. *Honeywood v. Peacock*, 3 Camp. 196. Bailiff.

52. A bankrupt who has not paid 15s. in the pound under a second commission, cannot be a witness for the assignees under that commission, although he has obtained his certificate and released his allowance and surplus. *Kennet v. Greenwollers*, Peake, 3. Bailment.

53. A creditor is a witness to prove an act of bankruptcy, if he releases to the assignees. *Koope v. Chapman*, Peake, 19. Bankrupt.

54. It seems that in an action by the assignees of a bankrupt for a payment made in contemplation of bankruptcy, the bankrupt (or his wife) may be a witness to prove that fact, since, by establishing the claim, the defendant becomes a creditor for the amount. *Jourdaine v. Lefevre and others*, 1 Esp. N. P. C. 67.

55. The converse of the rule, that a bankrupt is inadmissible to prove the act of bankruptcy, does not hold but that he may be examined touching the motive which prompted the act. *Oxade v. Perchard and another*, 1 Esp. C. 287.

56. In cases of bankruptcy it may be asked whether the bankrupt was not distressed at a particular period by bills becoming due, without first calling for the bills. *Sikes and others v. Marshal*, 2 Esp. C. 706.

57. In a suit by the indorsee of a note against the maker, the indorser, an uncertificated bankrupt, is competent to disprove the plaintiff's title. *Sikes and others v. Marshal*, 2 Esp. C. 707.

58. Where a bankrupt receives a demand which his certificate would otherwise discharge, the creditor is an incompetent witness to support

support the petitioning creditor's debt under a subsequent commission. *Roberts v. Morgan*, 2 Esp. C. 736.

59. In an action for fraudulently misrepresenting the circumstances of *B.*, a creditor of *B.*, since become bankrupt and uncertificated, is a competent witness for the plaintiff. *Burton v. Loyd*, 3 Esp. C. 207.

60. A bankrupt is incompetent to explain an equivocal act of bankruptcy. *Hoffman v. Pitt*, 5 Esp. C. 22.

61. The rule that a bankrupt is incompetent to support the commission, applies as well on cross-examination as examination in chief. *Wyatt v. Wilkinson* and another, 5 Esp. C. 187.

62. A creditor of a bankrupt who has not proved his debt under the commission is a competent witness to support the commission, although not to increase the estate. *Williams v. Stevens*, 2 Camp. 301.

63. In an action by the assignees of a bankrupt, the petitioning creditor is not a competent witness to support the commission, although he may be called on the other side to prove it invalid. *Green v. Jones*, 2 Camp. 411.

64. Where in an action on a promissory note against two defendants, one pleads his bankruptcy and the other the general issue, the former cannot, on proof of his certificate, be made a witness for the latter. *Currie v. Child* and others, 3 Camp. 283.

65. Upon an issue to try the validity of a commission of bankruptcy, a creditor is not a competent witness to support the commission, although he does not appear to have proved under it. *Adams and others v. Malkin* and others, 3 Camp. 543.

66. A petitioning creditor is a competent witness to defeat the commission, and even to cut down the petitioning creditors' debt. *Loyd and others v. Stretton*, 1 Starkie, 40.

67. *Quære*, whether in an action by the assignees of a bankrupt, the petitioning creditor is compellable in a court of law to produce the bill of exchange drawn and indorsed by the bankrupt, on which the petitioning creditor's debt is founded? A petitioning creditor called for the mere purpose of producing such a document, cannot, although he has been sworn, be cross-examined by the defendant. *Reed and another v. James*, 1 Starkie, 132.

68. A bankrupt in an action by the assignees against a judgment creditor who has taken the goods of the bankrupt in execution, is competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution. *Reed and another v. James*, 1 Starkie, 134.

69. Upon an issue to try whether an act of bankruptcy has been committed, a creditor is incompetent as a witness, although he has not proved under the commission. *Crooke v. Edwards*, 2 Starkie, 302.

70. On a prosecution against several persons for conspiracy, the wife of one of the defendants is an inadmissible witness for the others: a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. *Rex v. Locker* and others, 5 Esp. C. 107.

71. A barrister is not obliged to give evidence as to what he stated on a motion in court. *Curry v. Walter*, 1 Esp. C. 456.

72. The proper question to be asked a witness, in order to ground an objection to his competency, is not whether he believes in Jesus Christ or the Holy Gospels, but whether he believes in God and a future state? *Rex v. Taylor, Peake*, 11.

73. In

Baron and  
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Barrister.

Belief in fu-  
turity.

73. In an action against the maker of a promissory note, the indorser is a good witness to prove it paid. *Charrington v. Milner*, Peake, 8. Bill of exchange.

74. *Quære*, whether a party to a negotiable instrument can in any case be admitted as a witness to invalidate it? *Phetheon v. Whitmore*, Peake, 40. It is now settled that he may.

75. The drawer of a bill of exchange may be a witness for the acceptor to prove it paid. *Humphrey v. Moxon*, Peake, 52. But *quære*, if he has had regular notice of the bill having been dishonoured? *Ibid*.

76. *Quære*, whether the indorser of a bill of exchange is an admissible witness to invalidate it? *Adams v. Lingard*, Peake, 118.

77. The drawer of a bill of exchange given for an usurious consideration is a good witness to prove the usury, in an action against the acceptor, upon being released by him. *Rich v. Topping*, Peake, 224.

78. In an action by an indorsee against the acceptor, the indorser, on the acceptor releasing to him, is competent to prove that the indorsement was for an usurious consideration. *Rich and another v. Topping*, 1 Esp. N. P. C. 176.

79. In an action against the drawer of a bill, the acceptor is competent to prove that he had no effects. *Staples v. Okines*, 1 Esp. C. 332.

80. In an action by the indorsee against the acceptor, the indorser having given the acceptor a counter security, is an incompetent witness for him. *Pinkerton v. Adams and another*, 2 Esp. C. 611.

81. If the defence to an action by the indorsee of a bill is that he took it knowing that it was given as security for another bill, his witness, called to prove his title, may be asked by the defendant whether the plaintiff did not know that the bill was given for another, without first producing that bill. *Sikes and others v. Nairsball*, 2 Esp. C. 706.

82. In an action against the acceptor of a bill, the drawer is a competent witness for the defendant to prove that it has been paid, even though he is in prison under a charge of having forged the bill. *Barber v. Gingell*, 3 Esp. C. 62.

83. In an action against the acceptor of a bill, the drawer is a competent witness for the plaintiff to prove the handwriting of the acceptor. *Dickinson v. Prentice*, 4 Esp. C. 32.

84. In an action by the indorsee against the acceptor of a bill payable to the drawer's own order, the drawer is admissible to prove usury in the discounting of the bill. *Brard v. Ackerman*, 5 Esp. C. 119.

85. In an action by the indorsee against the drawer of a bill of exchange drawn without consideration, the payee, who indorsed it to the plaintiff in payment of goods, is a competent witness to prove the consideration for the indorsement. *Shuttleworth v. Stephens*, 1 Camp. 408. But in an action by the indorsee against the maker of a promissory note without original consideration, if the maker has become bankrupt and obtained his certificate subsequently to the date of the note, he is not a competent witness for the defendant. *Maundrell v. Kennett*, 1 Camp. 408 n.

86. In an action by the indorsee against the drawer of a bill of exchange, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it had become due. *Stevens v. Lynch*, 2 Camp. 332.

87. The joint acceptor of a bill of exchange is not competent to prove a set-off, in an action by the holder against the drawer. *Mainwaring v. Mytton*, 1 Starkie, 83.



88. The indorsee of a bill, in an action against the acceptor, having called a witness to prove the indorsement, who disproved it, the plaintiff was afterwards allowed to call the indorser himself to prove his own indorsement. *Richardson v. Allan*, 2 Starkie, 334.

89. *A.*, who is indebted to *B.*, gives him a bill of *C.*, drawn by *C.* within the knowledge of *A.*, to accommodate the drawee, to get discounted. *B.*, instead of discounting it, holds the bill as a security for the debt of *A.*, contending that *A.* gave it to him by way of payment of his debt. In an action upon this bill, brought by *B.* against *C.*, *A.* is not a competent witness to prove, on the part of the defendant, that he delivered the bill to *B.* merely to get it discounted, and not as payment, without a *release*. Because, in the event of the plaintiff's recovering, he would be liable to the costs of the action brought against *C.* as *special damage*, in an action against himself for the violation of his duty. *Harman v. Lasbrey*, 1 Holt, 390.

90. In an action against the acceptor of a bill of exchange accepted for the accommodation of the drawer, the latter is not a competent witness to prove that the holder discounted the bill on usurious terms. *Handwick v. Blanchard*, 1 Gow. 113.

Book-keeper.

91. A book-keeper to a carrier is a good witness for him, without a release. *Spencer v. Goulding*, Peake, 129.

Bribery.

92. By statute 2 Geo. 2. c. 24. s. 8., against bribery at elections, the legislature, in giving an indemnity and discharge to any person offending against the act who shall discover any other offender so that he may be committed, must also have intended that he should be competent to give evidence at the trial; and, therefore, in an action for penalties he has been admitted. So, in a prosecution on statute 21 Geo. 3. c. 37. against exporting machinery, the informer is competent. *Rex v. Teasdale and others*, 3 Esp. C. 68.

Captain.

93. In an action for sinking a barge, on board of which the plaintiff had a cargo of corn, the master may be a witness for him upon being released. *Spitty v. Bowens*, Peake, 53.

94. In an action against the owner for not safely carrying corn put on board his vessel, the captain is a good witness for the plaintiff. *Lay v. Holoch*, Peake, 101.

95. In an action for running down a ship, the defendant's captain may be rendered a competent witness for him, by a release to the captain, and the rest of the crew, with a single stamp, the captain's name standing first, and the release being first tendered to him. *Perry v. Bouchier*, 4 Camp. 80.

Carrier.

96. A carrier employed by *A.* first to carry a sum of money to *B.*, and then the like sum to *C.*, in an action by *A.* against *C.* is a good witness, from necessity, to prove that by mistake he delivered the first sum to *C.* as well as the second. *Baker v. Macrae*, 3 Camp. 144.

Character.

97. Where one party, in the cross-examination of his adversary's witnesses, endeavours to impeach his character but fails, the other cannot call witnesses to support it. *King v. Francis*, 3 Esp. C. 116.

98. Where a will is disputed on the ground of fraud, and some of the attesting witnesses are dead, the devisee may call witnesses to their character. *Doe ex dem. Walker v. Stephenson*, 3 Esp. C. 284; *Doe ex dem. Stephenson v. Walker*, 4 Esp. C. 50.

99. Evidence to support the character of a witness is not admissible, unless fraud is expressly imputed to him. *Bishop of Durham v. Beaumont*, 1 Camp. 207.

100. If the validity of a will is disputed on the ground of fraud, evidence

evidence may be given in favour of the character of the deceased attesting witnesses. 1 Camp. 209. a.

101. In an action for seducing the plaintiff's daughter, the mere cross-examination of the daughter, to show that she had been guilty of improper conduct, does not entitle the plaintiff to call other witnesses to her character. *Dodd v. Norris*, 3 Camp. 519.

102. A man who is proved to be a partner with the defendant cannot be examined as a witness to prove that he only is liable. *Goodacre v. Pereame, Peake*, 175. Co-defendant.

103. Where it is admitted, or appears, for any thing to the contrary, that a witness will be bound to contribute to a judgment against the party for whom he is called, he is incompetent without a release. Hence, on an issue to a plea in abatement of the non-joinder of other contractors, *A.* is inadmissible, unless released, to prove himself jointly liable. *Young v. Bairney*, 1 Esp. N. P. C. 103.

104. If in an action *ex delicto* against two, one goes to trial, and the other suffers judgment by default, the latter is a good witness for the former. *Ward v. Haydon and another*, 2 Esp. C. 552.

105. A defendant having pleaded bankruptcy, is not a witness for a co-defendant, on production of the certificate, though the other has released him. *Raven and another v. Dunning and another*, 3 Esp. C. 25.

106. One of two defendants in ejectment who has suffered judgment by default, is a competent witness for the plaintiff to prove the other in possession. *Doe ex dem. Harrop v. Green and another*, 4 Esp. C. 198.

107. On a joint indictment against several for a misdemeanour, a defendant who suffers judgment by default cannot be a witness for the others. *Rex v. Lafone and others*, 5 Esp. C. 154.

108. In an action of trespass, a co-trespasser, not sued, is a competent witness for the plaintiff; but if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, although he is for his co-defendants. *Chapman v. Graves*, 2 Camp. 333. n.

109. Upon a plea in abatement that the promises were made jointly with *A. B.* and others, *A. B.* is a competent witness for the plaintiff. *Cosham v. Goldney*, 2 Starkie, 414.

110. In an action at the suit of a tenant claiming a right of common over a piece of waste land, against the owner of an adjoining close for not repairing an intervening fence, the landlord, under whom the plaintiff holds the premises in respect of which he claims the right of common, is not a competent witness to prove the right. Neither in such an action are others who have a similar right of common, competent witnesses for that purpose. *Anscomb v. Shore*, 1 Camp. 290. Commoner.

111. It is never too late at the trial to object to the competency of a witness. (In this case, the objection was taken as soon as discovered.) *Stone v. Blackburn*, 1 Esp. N. P. C. 37. Competency.

112. A witness, who has a remedy by action whichever party succeed, is nevertheless interested, if there is a greater difficulty to enforce the remedy in one event than the other. *Buckland v. Tarkard*, 1 Esp. N. P. C. 85; S. C. 5 T. R. 578.

113. One who has engaged the plaintiff's attorney and undertaken for his costs, is a competent witness for the plaintiff, on being released by the attorney alone, since the attorney is not liable to the defendant succeeding for the costs of the action, neither therefore the party. *York v. Gribble*, 1 Esp. C. 319.

114. *Quære*, whether a witness must be rejected because, upon his cross-examination, he may be asked a question, the answer to which may criminate him? *Barber v. Gingell*, 3 Esp. C. 63.

115. When a witness, after his examination, has been dismissed from the box, his competency is not to be questioned.

Confidential  
communication.

116. A person consulted confidentially, on the supposition of his being an attorney, when in fact he is not one, is compellable to answer. *Fountain v. Young*, 6 Esp. C. 113.

117. Communications which take place between the governor of a distant province and his attorney-general are confidential; and if a witness is interrogated as to their substance in a court of justice, he is not bound to answer any questions respecting them. *Wyatt v. Gore*, 1 Holt, 299.

Creditor.

118. A creditor who is suing for the plaintiff abroad under a power of attorney, and who intends paying himself out of the sum recovered, is an incompetent witness for the plaintiff. *Powell v. Gordon*, 2 Esp. C. 735.

119. A creditor is a competent witness for his debtor. *White v. Baring* and another, 4 Esp. C. 24.

Cross examination.

120. A party may examine a witness called by his adversary, though he has not examined him. *Phillips v. Eamer* and another, 1 Esp. C. 357.

121. If a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause, so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. *Dickinson v. Shee*, 4 Esp. C. 67.

122. A witness cannot be cross-examined as to any collateral fact irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. *Sainthill v. Bound*, 4 Esp. C. 75.

123. A witness may be questioned on the cross-examination as to the existence of a deed, but not as to its contents. *Heath v. Hubbard*, 4 Esp. C. 206. As to the main points of this case which were reserved, see 4 East, 110.

124. In an information for obstructing custom-house officers in seizing smuggled goods, the defendant cannot examine as to the informer. *Rex v. Akers*, 6 Esp. C. 125. n.

125. Any question may be put to a witness in cross-examination, the answer to which may have a tendency to discredit him; but if such a question be collateral to the matter in issue, the answer which the witness gives must be taken as conclusive, and other witnesses cannot be called to contradict him. *Harris v. Tippet*, 2 Camp. 637.

126. The defendant cannot in the course of the plaintiff's evidence cross-examine the plaintiff's witnesses as to the contents or written documents, although notice has been given to the plaintiff to produce them, and he refuses to produce them in that stage of the cause. *Sideways v. Dyson* and another, 2 Starkie, 49.

127. If a party in a cause be under the necessity of calling his real adversary in the cause (who is not a party on record) although for the purpose of formal proof only, he makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. *Morgan v. Brydges*, 2 Starkie, 314.

128. Upon the trial of *A. B.* and *C.* for conspiracy, where after the case on the part of the prosecution is closed, *C.* only calls wit-  
nesses

nesses and examines as to a conversation between himself and A.; the counsel for the crown may cross-examine such witness as to any other conversation between A. and C., although the evidence tend chiefly to criminate A. *Rex v. Krochl and others*, 2 Starkie, 343.

129. A witness having been called into the box and sworn in the course of a prosecution for a misdemeanor, produces a document but is not examined, the defendant is entitled to cross examine. *Rex v. Brooke*, 2 Starkie, 472.

130. A witness to the crown cannot on cross-examination be compelled to state through what channel he made a disclosure to government, either immediately or mediately. *Rex v. Watson*, 2 Starkie, 135. Crown witness

131. Where a right is claimed for all customary tenants, one is not a witness for the other. *Jebb v. Povey*, 2 Esp.C. 681. Customary tenant.

132. Where it appeared that the defendant a few minutes after having executed the deed, brought it to the witness in an adjoining room and desired him to attest it, another attesting witness was still in the room where the deed had been executed; and it was further proved, that the witness was acquainted with the defendant's handwriting, and that the defendant knew of his being acquainted with it, and that the defendant had acknowledged the instrument, but there was no proof of the act of delivery, and no reason was shown why the other attesting witness could not be called to prove the delivery; held that the whole might be considered as one transaction, and that there was sufficient proof of the execution. *Park v. Mears*, 3 Esp. C. 171; S.C. 2 B. and P. 217. Deed.

133. Where no direct evidence can be produced against a witness, a question the answer to which would charge him obliquely, is inadmissible. *Doxon v. Haigh and another*, 1 Esp.C. 411. Discredit.

134. The credit of a witness may be impeached by proving that he has made statements out of court on the same subject, contrary to what he swears at the trial. *De Saily v. Morgan*, 2 Esp. C. 691.

135. The regular mode of impeaching the credit of a witness, is to inquire whether the witnesses have the means of knowing the former witness's general character, and whether from such knowledge, they would believe him on his oath. *Mawson v. Hartsink and another*, 4 Esp. C. 102.

136. A witness is not compellable to declare his own infamy, or to confess what would degrade his character. *Rex v. Lewis and another*, 4 Esp. C. 225; *Macbride v. Macbride*, Id. 242.

137. To impeach the credit of a witness by proof that he deposed on a conviction before a magistrate contrary to what he now swears, his deposition must be proved by those who heard him, not by the recital of his testimony in the conviction. *Rex v. Howe*, 6 Esp. C. 124.

138. If a witness unexpectedly give evidence against the party calling him; although his evidence cannot be in part relied upon and the rest of it disproved, it may entirely be repudiated, and witnesses may be called on the same side to contradict him. *Alexander v. Gibson*, 2 Camp. 556.

139. In an action for seducing the plaintiff's daughter *per quod servitium amisit*, the daughter is not bound to answer in cross-examination, whether she had not previously been criminal with other men. *Dodd v. Norris*, 3 Campbell 519.

140. Evidence of a particular collateral fact cannot be adduced in any case, whether civil or criminal, in order to discredit a witness;

the only modes of impeaching the credit of a witness are by cross-examination, by producing the record of his conviction of some crime, or by adducing general evidence that he is unworthy of being believed upon his oath; if a witness be asked as to a collateral fact, his answer is conclusive. *Rex v. Watson*, 2 Starkie, 149.

#### Ejectment.

141. In an ejectment between two persons (both claiming under a demise from the same person) the landlord who has become a bankrupt may be a witness, to prove that the premises in dispute were not included in the first lease. *Longchamps v. Fawcett*, Peake, 70.

142. In ejectment on the several demises of two persons, although the evidence shews the title to be exclusively in one of them, the other cannot be compelled to be examined as a witness for the defendant. *Fenn v. Granger*, 3 Camp. 177.

#### Escape.

143. A man who has been arrested is a good witness in an action against the sheriff for his escape. *Cass v. Cameron*, Peake 124.

#### Executor.

144. Where issue is taken on a replication *per fraudem* to an outstanding judgment pleaded by an executor, the judgment creditor is an incompetent witness for the defendant. *Campion v. Bentley*, 1 Esp. C. 343.

145. In suits by executors, as such, a creditor of the estate is a good witness for the plaintiff. *Paull v. Brown*, 6 Esp. C. 34.

146. In an action at the suit of an executor or administrator, if the estate of the testator or intestate is insolvent, a person who has an unsatisfied demand upon it, is not a competent witness for the plaintiff. *Craig v. Cundell*, 1 Camp. 381.

147. In an action by an executor, the residuary legatee is not rendered a competent witness for the plaintiff, by releasing all claim to the debt sought to be recovered, having still an interest to support the action, that the costs may not be a charge upon the estate. *Baker v. Tyrwhitt*, 4 Camp. 27.

#### Foreign attachment.

148. The garnishee under a foreign attachment having received the money, is incompetent to prove his demand or support the proceedings. *Lord Barrymore v. Taylor*, 1 Esp. C. 327.

#### Habeas corpus.

149. A witness from the country on his arrival in London, for the purpose of giving evidence in a cause which stands for trial during the sittings, is arrested for debt; the proper course for obtaining his discharge is, to bring him before a judge at chambers by writ of *habeas corpus*. *Ex-parte Tillotson*, 1 Starkie 470.

#### Handwriting.

150. One who has never seen a party write, nor seen writing which he acknowledged was his own, cannot be a witness to prove that a handwriting is his; thus an inspector of franks, though he has repeatedly suspected franks purporting to be the party's. *Batchelor v. Honeywood*, 2 Esp. C. 714.

#### Highway.

151. It is no objection to the competency of a witness who comes to prove a highway, that he is the owner of an adjoining piece of land, and has let a road to A. at a certain sum of money *per annum*, which he cannot use unless the road in dispute be established. *Pollard v. Scott*, Peake, 18.

#### Honorary obligation.

152. An honorary obligation, which will be affected by the event of the cause, is not an objection to the competency of a witness. *Pedderson v. Stoffes*, 1 Camp. 144.

#### Incompetency.

153. A record of a conviction of felony without a caption is not admissible in evidence to incapacitate a witness. *Coke v. Maxwell*, 2 Starkie, 183.

#### Infant.

154. In an action of tort against a manor for the negligence of his agent (semble), his guardian cannot render the agent competent by releasing him. *Fraser v. Marsh*, 2 Starkie, 41.

155. The

155. The informer against a person guilty of concealing naval stores is a good witness to prove the offence, for the court is not obliged to inflict a pecuniary penalty. *Rex v. Cole*, Peake, 217. Informer.

156 Where a statute leaves it discretionary with the court to inflict a corporal punishment, or a pecuniary penalty, part of which is to go to the informer, he is a competent witness against the defendant. *Rex v. Cole*, 1 Esp. N. P. C. 169, over-ruling *Rex v. Blackman*, 1 Esp. N. P. C. 96.

157. If naval stores are seized by *A.* in consequence of *B.*'s information, *B.* is informer within the statute, and alone incapacitated as such for a crown witness on an information under st. 9 and 10 W. 3. c. 41, and 17 G. 2. c. 40., *Rex v. Banks*, 1 Esp. N. P. C. 144.

158. In an action on a policy for a loss by the barratry of the captain, he is not, unless released by the underwriter, competent to prove that the owner was privy to the act. *Bird v. Thompson*, 1 Esp. C. 339. Insurance.

159. Underwriters having subscribed the same policy are witnesses for one another, though called to impeach the credit of a witness upon whose testimony the plaintiff, in a former action on the policy, had recovered; thus, to prove that no representation, as stated by the witness, had been made. *Akers v. Thornton*, 1 Esp. C. 414.

160. An underwriter who pays on a promise of repayment, if the policy be determined to be invalid, is not a competent witness for another underwriter who disputes the loss. *Aliter*, if the promise of repayment had been made after he had paid unconditionally, or if the plaintiff had fraudulently entered into the agreement with him for the purpose of taking off his testimony. *Forrester and another v. Pigou*, 3 Campbell, 380.

161. An interpreter who is present at conversations between a foreigner and his attorney, is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him after the cause, for the purpose of which the confidence was placed, is at an end. *Du Barré v. Livette*, Peake, 77. Interpreter.

162. A journeyman is competent to prove the delivery of goods by him in an action for the price, without a release, unless it is proved to be the usage of the trade or particular dealing for the customer to pay him. *Adams v. Davis*, 3 Esp. C. 48. Journeyman.

163. A tenant in possession is an incompetent witness in support of the title under which he holds. *Doe, ex dem. Winckley v. Pye*, 1 Esp. C. 364. Landlord and tenant.

164. A landlord is incompetent to prove that his lessee is entitled to the premises in an action for disturbing him. *Smith v. Chambers*, 4 Esp. C. 164.

165. In an action at the suit of a lessor against his lessee, for not cultivating a farm according to covenants contained in the indenture of lease, a sub-lessee of part of the premises is a competent witness to prove performance of the covenant on the part of the defendant. *Wishaw v. Barnes*, 1 Camp. 341.

166. A leading question may be put, when it is necessary to contradict a witness on the other side, as to the contents of a paper which has been destroyed. *Courteen v. Touse*, 1 Camp. 43. Leading question.

167. A witness called to prove that *A.* and *B.* are partners, is asked whether *A.* has interfered in the business of *B.*; this is not a leading question. If questions are asked, to which the answer yes or no would be conclusive, they are objectionable; but otherwise not. *Nicholls v. Dowding and another*, 1 Starkie, 81.

Magistrate's clerk.

168. In an action for a libel in the shape of an extra judicial affidavit sworn before a magistrate, a person who acted as the magistrate's clerk, is not bound to answer whether by the defendant's orders he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself. *Maloney v. Bartley*, 3 Camp. 210.

Marriage.

169. A man who has been in fact married, may be a witness to prove such marriage illegal. *Standen v. Standen*, Peake, 32.

Member of parliament.

170. A member of parliament is obliged to answer as to whether another member had taken part in a debate; but not as to what he said. *Plunkett v. Cobbett*, 5 Esp. C. 137.

Misrepresentation.

171. In an action for a deceitful representation of the credit of a third person, that person is a competent witness for the plaintiff. *Richardson v. Smith*, 1 Camp. 277.

172. In an action by *A.* against *B.*, for falsely representing *C.* as trust worthy, in consequence of which *A.* gave credit to *C.*, the latter is a competent witness. *Smith v. Harris*, 2 Starkie, 47.

Motive.

173. If the question is, whether several proprietors of boxes at the theatre gave them up from a particular cause, themselves, and not the box-keeper are the proper witnesses, since they alone are cognisant of their own motives. *Ashley v. Harrison*, 1 Esp. N. P. C. 49.

Non-attendance.

174. No action lies against a witness for non-attendance, unless the cause has been called on and the jury sworn. *Bland v. Swafford*, Peake, 60.

Non-suit.

175. After a plaintiff in the course of a cause has submitted to be nonsuited, the counsel for the defendant cannot put any further question to a witness. *Jones v. Hall*, 2 Starkie, 505.

Oath.

176. A member of the kirk of Scotland may be sworn without kissing the book. *Mee v. Reid*, Peake, 23.

177. A witness who professes himself to be now a Christian, whatever his persuasion may formerly have been, is properly sworn upon the Gospels. *Rex v. Gilham*, 1 Esp. C. 285.

Official oath.

178. Notwithstanding the oath administered to a collector of the property tax by the commissioners, that he will not disclose any thing he learns in that capacity, except with their consent, or by virtue of an act of parliament, he is bound, when subpoenaed as a witness, to give evidence of all facts within his knowledge, touching the matter in question. *Lee, qui tam v. Birrell*, 3 Camp. 337.

Parishioner.

179. A liability to be rated, does not render a witness incompetent. *Chivers v. Brand*, 1 Esp. N. P. C. 175.

180. Where the expences of an action are what cannot legally be done, to be defrayed out of the poor-rates by agreement of parishioners, a rateable parishioner, who only intends to submit to the rate without otherwise paying any part of the expence, is a competent witness. *Yates v. Lance*, 6 Esp. C. 132.

181. The owner of landed property within a chapelry is not a competent witness to relieve the inhabitants of the chapelry from the permanent burthen of repairing the parish church, although the witness does not reside within the chapelry, and his lessee for years of his estate within the chapelry, is bound to pay all rates. *Rhodes v. Ainsworth*, 2 Starkie, 215.

182. It is an objection to the competency of a witness, who comes to discharge certain premises from a rate, that he has property of the kind in question in the occupation of a tenant subject to such rate if established, and therefore his own reversionary interest may be affected thereby. *Rhodes v. Ainsworth*, Holt, 619.

183. A

183. A pardon will restore the competency of a witness where the disability is a consequence of the judgment. But where the disability is declared by act of parliament to be part of the punishment, as in the case of a conviction for perjury, (not at common law, but) on st. 5 Eliz. c. 9. the king's pardon will not make the witness competent. *Dover v. Maestaer*, 5 Esp. C. 94. Pardon.

184. In an action brought by one partner, another may be called to prove the debt paid to him. *Evans v. Silverlock, Peake*, 21. Partner.

185. In an action against *A.* for goods delivered to him, brought on the assumption that he is in partnership with *B.*, he may call *B.* to prove that no partnership subsists, unless there is already evidence to the contrary. *Birt v. Hood*, 1 Esp. N. P. C. 20.

186. One of two partners is not a competent witness for the other sued alone, without a release from the plaintiff. *Cheyne v. Koops*, 4 Esp. C. 112.

187. One who was to have shared in the profits of a cargo, is a competent witness for the plaintiff in an action on a policy on the cargo. *Robertson v. French*, 4 Esp. C. 246.

188. Where a partnership is carried on in the names of two, of whom one has no share therein, he may be a witness for the other in an action for goods sold. *Parsons v. Crosby*, 5 Esp. C. 199.

189. Assumpsit against several as partners, the question of partnership being doubtful upon the plaintiff's evidence, the defendants go into their case, and in order to render a witness competent, produce a release executed by all of them, this instrument is to be considered as in evidence for all purposes. *Gibbons v. Wilcox, Obery*, and another. 2 Starkie, 43.

190. The rule that a party to a written instrument cannot impeach its validity, seems to be given up. *Rich and another v. Topping*, 1 Esp. N. P. C. 176. Party to a deed.

191. A party to an instrument is an incompetent witness to impeach it. *Hart v. McIntosh*, 1 Esp. C. 298.

192. The person who has been charged with a sum of money by the perjury of the only witness examined, and has filed a bill for relief, is not a competent witness on an indictment for that perjury, though he has since paid the money. *Rex v. Dalby, Peake*, 12. Perjury.

193. A party to a suit who has succeeded therein, is a good witness on an indictment for perjury committed in the course of that suit. *Rex v. D'Faria, Peake*, 104.

194. It is no objection to the competency of a witness on an indictment for perjury committed in an answer in chancery, that, in his answer to a cross bill filed by the defendant, he has sworn the fact which he is to prove on the indictment. *Rex v. Pepys, Peake*, 138.

195. In a prosecution for perjury, the person injured cannot be a witness for the crown, unless he has satisfied the judgment in the suit in which the perjury was committed. *Rex v. Eden*, 1 Esp. N. P. C. 97. But the principle of this doctrine is now exploded. See *Bartlett v. Pickersgill*, 4 East, 577. n. (b.) *Rex v. Boston*, 4 East, 581.

196. In an action on the case for running down a ship, a pilot under whose management the defendant's ship was when the accident happened, is rendered a competent witness for the defendant by a release from him, although he was hired and paid by the captain. *Aldridge v. Simmons*, 4 Camp. 392. S. C. 1 Starkie, 214. Pilot.

197. A person about whose house work has been done by the plaintiff, is not a good witness to prove that the defendant is liable until she is released. *New v. Chidgey, Peake*, 98. Release.

198. Since



198. Since one of several who are jointly interested in a right of action may discharge it, a release by one will make the party liable a competent witness for all. *Hockless and another v. Mitchell*, 4 Esp. C. 86.

199. If an interested witness is to be rendered competent by a release, the release must be either produced in court, or evidence must be given of its being destroyed. *Corking v. Jarrard*, 1 Camp. 37.

200. In an action for the value of goods furnished on the defendant's credit to a third person, that person is not a competent witness for the plaintiff without a release. *Wright v. Wardle*, 2 Camp. 200.

201. If this person be a married woman, living apart from her husband, whether he must be released to render her a competent witness? *Wright v. Wardle*, 2 Camp. 200.

Res inter alios  
acta.

202. To show that a tradesman demands an exorbitant profit, it may be asked of those employed under him what they received. *Fricker v. French*, 5 Esp. C. 79.

Scientific opi-  
nion.

203. A shipbuilder may be called as a witness to give his opinion as to the sea-worthiness of a ship, on the facts stated by others. *Thornton v. Exchange Assurance*, Peake, 25.

204. Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject. *Chaurand v. Angerstein*, Peake, 43.

205. Upon a question concerning the sea-worthiness of a ship, after the evidence of persons who have examined her condition, experienced shipwrights who never saw her, may be called to say whether upon the facts sworn to, she was in their opinion sea-worthy or not. *Beckwith v. Sydebotham*, 1 Camp. 117.

206. The opinion of one conversant in the business of insurance as a matter of judgment, whether the communication of particular facts would have enhanced the premium, is admissible evidence, but he cannot be asked what he himself would have done in the particular case. *Berthon and another v. Loughman*, 2 Starkie, 258.

Servant.

207. On the principle of necessity, a servant is a competent witness without a release, to prove the payment of money on behalf of his master. *Matthews v. Haydon*, 2 Esp. C. 509.

208. In an action for running against plaintiff's cart with a dray, the servant who was driving the cart when the accident happened is not a competent witness for the plaintiff without a release. *Miller v. Falconer*, 1 Camp. 251.

Sheriff.

209. In an action against the sheriff for an improper return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, he must adduce some evidence that the rent was due, for which purpose the landlord of the premises is not a competent witness. *Keightley v. Birch and another*, 3 Camp. 521.

Shipowner.

210. An owner of a ship is not a witness (in an action on an insurance of goods put on board that ship), to prove her sea-worthy until released by the plaintiff. *Rotheroe v. Elton*, Peake, 84.

211. A. whose name has been registered as the partner of a vessel on the oath of B., and has afterwards conveyed such share by deed to B., covenanting for the goodness of his title, cannot be admitted to prove by the evidence of B., that he had in fact no interest in the vessel. *Nickson v. Thomas*, 1 Starkie, 85.

Subpoena.

212. The name of a witness, though not in the original subpoena, may be inserted therein at any time, if he has been regularly served with a copy. *Wakefield v. Gall*, 1 Holt, 526.

213. An officer of the tower not permitted to prove that a particular plan of the Tower produced by the defendant is a correct one. Tower.  
Rex v. Watson, 2 Starkie, 148.

214. Mere trustees of a public charity are good witnesses in an action brought against themselves in their corporate capacity. Trustees.  
Weller v. the Foundling Hospital, Peake, 152.

215. An elector who is a bare trustee, is competent to prove the mode of election. Withnell v. Gartham, 1 Esp. C. 322.

216. The party in whose right a defendant in replevin avows, is only a trustee, and so described an incompetent witness for him. Golding v. Nias, 5 Esp. C. 272.

217. In an action for the penalties of usury, the borrower of the money is a competent witness to prove the case. Usury.  
Smith v. Prager, 2 Esp. C. 486; T. C. 7. T. R. 60.

218. In an action against a certificated conveyancer, for negligence in managing the purchase of an annuity for the plaintiff, a joint purchaser is a competent witness for the plaintiff. Vendor and purchaser.  
Rothery v. Howard, 2 Starkie, 68.

219. A man who by his own examination on the *voir dire* is rendered an incompetent witness, may be asked any question to show that his interest is at an end, though the fact by which his interest be destroyed is matter of record. 1 Esp. 164. S. C. Botham v. Swingler, Peake, 218. Voir dire.

220. Where the objection to the competency of a witness arises from his answer on the *voir dire*, and not by other means, it may likewise be removed on the *voir dire*, by examining him as to the continuance of his interest without giving the best proof that his competency has been restored. Butcher's Company v. Jones, 1 Esp. C. 160.; Botham v. Swingler, Id. 164.

221. In a regular examination upon the *voir dire*, before the examination in chief, a witness may be interrogated as to the contents of written instruments not produced; but this cannot be done after the examination in chief, although the only object of the questions put be to show, that the witness is interested. Howell v. Lock, 2 Camp. 14.

222. A witness on examination on the *voir dire* acknowledges that he has entered into a contract, (the effect of which is to render him incompetent), at the same time he produces the written contract itself, this ought to be read. Butler v. Carver, 2 Starkie, 439.

223. In an action on the warranty of a horse, a former proprietor by whom it had been sold to the defendant under a like warranty, is admissible to prove that it was then sound. Warranty.  
Briggs v. Crick, 5 Esp. C. 99.

224. On a question whether a stream of water ought to run in a particular line, one who will be equally benefited with the party maintaining the affirmative if he succeeds, is an incompetent witness for him. Water course.  
Jebb v. Povey, 2 Esp. C. 679.

225. Where to trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a licence, to which the plaintiff now assigned excess; it appeared that the plaintiff had given the defendant leave to do what was necessary for repairing his own house, which adjoined the plaintiff's; and it was held, that the workmen employed to do the repairs were competent witnesses for the defendant to disprove the excess without a release. Workmen.  
Cuthbert v. Gostling, 3 Camp. 515.

## ACCORD AND SATISFACTION.

- Privy.** 1. *A.* pays a debt which he owes *B.* to *C.* under a mistaken authority; *B.* sues *A.* for the debt, and is himself sued by *C.* for another demand; *A.* obtains an order to stay proceedings on payment of debt and costs, but afterwards goes to trial; after such order obtained, *C.* compromises his action with *B.* by receiving part of his demand and taking the payment made to him by *A.* for the residue. Held, that this compromise was no bar to *B.*'s action against *A.*; *secus*, had it been made prior to the order. *Jones v. Booth* and another, 2 Esp. C. 600.
- Conditional.** 2. An action being brought against the acceptor of a bill of exchange, it is agreed between the parties, that the defendant shall pay the costs, renew the bill, and give a warrant of attorney to secure the debt. The defendant gives the warrant of attorney, and renews the bill; but does not pay the costs. The plaintiff may bring a fresh action on the first bill, while the second is outstanding in the hands of an indorsee. *Norris v. Aylétt*, 2 Camp. 329.
- Instruments deposited as securities.** 3. If policies of insurance are lodged with the payee of a bill of exchange as a collateral security, they do not operate as satisfaction till money is actually received upon them, although upon a submission to arbitration, a certain sum may have been awarded to be due upon them. *Scott v. Lifford*, 1 Camp. 246.

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## ACCOUNT STATED.

- Whether conclusive.** If, on a settlement of accounts, items are allowed which the party could not have been compelled to pay, thereby leaving a balance in favour of the other side, he is concluded by such allowance. *Dawson v. Remnant*, 6 Esp. C. 24.

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## ADULTERY, ACTION FOR.

- When maintainable.** 1. The husband, by committing adultery himself, does not licence his wife to do the same. *Bromley v. Wallace*, 4 Esp. C. 237. cor. *L'Alvanley*; *Wyndham v. Lord Wycombe*, Id. 16. cor. *Lord Kenyon*, contra.
2. It is no bar to an action against *A.* for criminal conversation with the plaintiff's wife, that the plaintiff had brought another action of the same kind against *B.*, and having obtained a verdict and judgment, had charged *B.* in execution, although the cause of action in both suits accrued during the same period. *Gregson v. M<sup>r</sup> Taggart*, 1 Camp. 415.
- When not maintainable.** 3. No action will lie for an illicit intercourse with a wife after a separation. *Weedon v. Timbrel*, 1 Esp. N. P. C. 16.; *S. C.* 5 T. A. 357. *Bartelot v. Hawker, Peake*, 7. *Sed vide Ham. N. P.* 232.
4. In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action; and not merely to mitigate the damages. *Hodges v. Windham, Peake*, 39.

## ALIEN FRIEND.

1. A foreigner domiciled in England is so far a British subject, that his property here is British property, and a warranty therefore in a policy, that his ship belongs to his own country, is false. *Tabbo v. Bendeleck*, 4 Esp. C. 108. His relation with the country in which he resides.
2. A native of England domiciled in a foreign country is entitled to all the privileges allowed to subjects of that country. *Case of the Argonaut*, 4 Esp. C. 110.
3. The alien act of 34 Geo. 3. c. 9. did not prohibit aliens from suing for money due to them, but only the sending it out of the kingdom. *Michelotte v. Dillon*, 2 Esp. C. 622. Construction of the alien act.

## ALIEN ENEMY.

1. The subject of a neutral power taken in an act of hostility with, and in adherence to the king's enemies, is not himself considered an enemy except *quoad* that act; therefore whilst a prisoner of war, he may sue on a contract made after his capture with a British subject. *Sparenbergh v. Bannatyne*, 2 Esp. C. 581. Who is or is not.
2. If a British subject voluntarily resides in an enemy's country and carries on commerce there, he is disqualified as an alien enemy, to sue in our courts of justice, although naturalized by a neutral state, and recognized as a citizen of that state, both by its diplomatic agents and by the enemy's government. And *semble*, that if a neutral voluntarily resides and carries on commerce in an enemy's country he is an alien enemy to all civil purposes. *O'Medley v. Willson*, 1 Camp. 482.
3. *Semble*, that an insurance on goods the property of a neutral to a port occupied by the enemy is void. But although a neutral should himself be resident in a place occupied by the enemy, an insurance on goods his property to a neutral or friendly port is valid. *Bromley v. Heseltine*, 1 Camp. 75.
4. In an action on a policy of insurance it is no defence under the general issue, that the persons interested, who were neutrals when the policy was effected and the loss happened, had become alien enemies before action brought. *Harman v. Kingston*, 3 Camp. 152. Effect of alien enmity upon a depending suit.

## AMENDMENT.

1. Where there are materials for amendment, the rule is the same in criminal as in civil cases. *Rex v. Page*, 2 Esp. C. 650. n. In criminal suits.
2. In a *qui tam* action the court will, after verdict, direct a *similiter* to be entered, although the objection founded upon the event of it was taken at the trial. *Wright v. Horton*, 1 Starkie, 400. By entering a similiter after verdict.
3. The alteration of matter of material allegation cannot be made by way of amendment at *Nisi Prius*; for instance, the omitting the profert of the bond on which the action is brought. *Paine v. Bustin*, 1 Starkie, 74. At nisi prius.
4. The *Nisi Prius* record may be amended in court after the cause is called on, by a rule made *instantly* with the consent of both parties. *Murphy v. Marlow*, 1 Camp. 57.

## ANNUITY.

### Memorial.

1. The purchase money of an annuity was paid by the grantee on the 24th into his banker's, in the joint names of his own attorney and the grantor, until the deeds were executed. They were executed on the 26th, when the money, with the consent of the attorney, is paid by the banker to the grantor: held, that the memorial properly stated that the money was paid on the 26th, and by the grantor. *Coare v. Gibley*, 4 Esp. C. 231.

2. A trustee under an annuity deed executes the deed after the memorial has been enrolled; it is not necessary that a memorial of his subsequent execution should be enrolled. *Doe ex dem. Delegal and others v. Holloway*, 1 Starkie, 431.

### Rescission of.

3. Where an annuity is rescinded after it has been paid for some time, the purchaser is entitled to receive back his whole purchase money. *Beauchamp v. Borret*, Peake, 109.

4. Where an annuity is avoided by a defect in the memorial, the grantee cannot recover back the consideration money, unless the deeds have been set aside by the court, or the grantor has vacated the transaction by refusing to execute fresh securities or to pay the annuity. *Weddel v. Lynam and another*, 1 Esp. C. 309.

5. Where the grantee of an annuity becomes entitled to recover back the consideration money, all payments made and expences incurred by the grantor on account of the annuity must be allowed. *Weddel v. Lynam and another*, 1 Esp. C. 309.

6. Where an annuity has been set aside, the grantor has been indebted from the time the consideration (money) was paid; therefore the debt is barred by his bankruptcy in the interim. *Walker v. Liscarry*, 6 Esp. C. 98.

7. Where the grantee of an annuity set aside for a defective registry brings an action for money had and received, to recover back the consideration, the grantor may set off the payments made in respect of such an annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hills v. Hills*, 4 Esp. C. 196; *S. C.* 3 East, 16, by the name of *Hicks v. Hicks*.

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## APOTHECARY.

### Ignorance in.

It is a good defence, in an action by an apothecary, that he treated the patient ignorantly or improperly. *Aliter*, if the medicines were administered under the direction of a physician. *Kanneu v. M'Mullen*, Peake, 59.

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## ARBITRATION.

### Authority of arbitrator.

1. It is within the scope of the jurisdiction of an arbitrator, to whom all matters in difference are referred, to direct one of the parties, who has acted as agent for the other in supplying provisions to the British army, to go before the commissary to verify particular documents. *Atkyns v. Baldwin*, 1 Starkie, 209.

### His right to remuneration.

2. An arbitrator cannot, without an agreement, demand a remuneration for his services. *Virany v. Warne*, 4 Esp. C. 47.

3. An

3. An award is an extinguishment of the original cause of action, unless it can be avoided by showing partiality, refusal to hear witnesses, or similar conduct in the arbitrator. *Bailey v. Lechmere*, Esp. C. 377. Legal effect of an award.

4. In an action on award, to recover the sum awarded, the defendant cannot dispute the validity of the award, his proper course being to apply to the court to have it set aside. *Swinford v. Burn*, 1 Gow. 5.

5. *Quære*, whether an award directing the assignment of an interest to *A. B.* will warrant an assignment to *A. B.*, his executors, administrators, and assigns? *Russel v. Headington*, 1 Starkie, 13. Construction of award.

6. Whether a particular cause of action has been included in an award is matter of evidence. *Martin v. Thornton*, 4 Esp. C. 180. Extent of award.

7. Though an award has been made under a reference of all matters in difference, it may still be shown, by calling the arbitrator, that a particular dispute was not opened. *Martin v. Thornton*, 4 Esp. C. 181.

8. A submission to arbitration may be given in evidence on a count on the original promise. *Kingston v. Phelps*, Peake, 227. Pleadings.

9. An award where the submission is not by deed, may be given in evidence under the account stated. *Keen v. Batshore*, 1 Esp. N. P. C. 194.

## ARMY.

1. The king may at any time stop the half-pay of an officer in the army, by signifying his pleasure that it shall be no longer paid. *Macdonald v. Steele*, Peake, 175. Half-pay.

2. The liability of the colonel of a regiment for knapsacks furnished to the regiment by his order, depends upon the question whether they were supplied upon his personal credit. Where the tradesman who furnishes necessaries to a regiment looks to the regimental fund as the medium through which he is to obtain payment, though by the assistance of the colonel, the latter is not personally responsible. *Prosser v. Allen*, 1 Gow. 117. Liability of officer to tradesmen.

## ARMY-AGENT.

An army-agent, to whom an officer abroad sends his resignation, is answerable to him for the money arising from the sale of his commission. *Sturdy v. Ross*, 1 Esp. C. 450.

## ARREST.

1. As to what shall be deemed an outer door in a particular situation, see *Hopkins v. Nightingale* and another. 1 Esp. N. P. C. 99. Outer door.

2. An officer is not bound to discharge a debtor arrested on *mesne* process immediately on receiving a written order from the creditor, but is allowed a reasonable time to search for detainers against him: twenty-four hours is not unreasonable. *Taylor v. Brander* and another, 1 Esp. N. P. C. 45. Discharge from.

## ASSUMPSIT.

When the appropriate form of action.

1. Where services have been performed under a deed executed by the plaintiff alone, he may have assumpsit for a remuneration. *Sutherland v. Lishnan*, 3 Esp.C. 42.

2. Assumpsit lies for the occupation of premises under a deed not amounting to a demise. *Elliott v. Rogers*, 4 Esp.C. 59.

When not.

3. Where goods were sold "to be paid for by his bill on *P.* without recourse on the buyer in case of its not being paid;" although the buyer then knew the bill to be worth nothing, he is not liable to an action of *indebitatus assumpsit* for the value of the goods. The proper form in which to sue him is trover, or deceit. *Read v. Hutchinson*, 3 Camp. 352.

4. An action of assumpsit cannot be maintained on a running account between a merchant and a broker, the proper remedy at law being an action of account. *Scott v. McIntosh*, 238.

By and against whom maintainable.

5. If *A.*, having ready money belonging to *B.*, agrees with *B.* to pay it over to *C.*, *C.* may sue *A.* for it in his own name by action for money had and received. *Surtees and another v. Hubbard*, 4 Esp.C. 204.

6. Agents in *England* effect a policy of insurance for a correspondent abroad, on which a loss happens: he draws a bill upon them, which is presented to them for acceptance by the indorsee: they say they cannot accept it, having no funds in hand, but that on a settlement with the underwriters it shall be paid: the agents receive from the underwriters a sum less than the amount of the bill. Held, that this might be recovered from the agents by the indorsee, as money had and received to his use. *Langston and others v. Corney and others*, 4 Camp. 176.

7. An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution. *Green and others v. Austin*, 3 Camp. 260.

8. Goods come to a wharfinger's consigned to *A.*; *B.*, believing them to be intended for himself, carries them from the wharf and uses them before he discovers the mistake: held, that the wharfinger, after paying *A.* the value of the goods, could not maintain an action against *B.* for money paid, to recover the amount. *Sills and others v. Laing*, 4 Camp. 81.

When the action may be general.

9. If goods are delivered on the terms of sale or return, and the person receiving them does not return them in a reasonable time, the value of them may be recovered in an action for goods sold and delivered. *Bailey v. Gouldsmith*, Peake, 56; et vide *id.* in notes.

10. An action for goods bargained and resold lies on a sale by auction, notwithstanding they have been resold pursuant to the conditions on default of removal. *Mertens v. Adcock*, 4 Esp.C. 251.

11. Where goods have been sold to be paid for by bills at a certain date, on the expiration of the time at which they would have become due, had they been given, the vendor may declare generally for goods sold. *Heron v. Granger*, 5 Esp.C. 269.

12. *A.* delivers to *B.* a quantity of cordage as the consideration for a special undertaking by *B.*; *A.* is not precluded by the special contract from recovering under the common counts for the excess of cordage delivered beyond the quantity stipulated for as the consideration.

sideration (provided that amount be adjusted), although it may be necessary to give in evidence the terms of the special contract. *Dunn v. Body*, 1 Starkie, 220.

13. Under a general count in *indebitatus assumpsit* for work, labour, and materials, plaintiff may recover for attention as farrier, and for medicines administered in the cure of the defendant's horses. *Clark v. Mumford*, 3 Camp. 37.

14. Where a servant is hired by the quarter, if he is discharged by his master without sufficient cause in the middle of the quarter, he may recover the quarter's wages under a count in *indebitatus assumpsit* for work and labour. *Gandall v. Pontigny*, 4 Camp. 375.

15. *A.* being employed by *B.* as a clerk, at a salary of 200*l.* per annum, payable quarterly, is discharged in the middle of the quarter, and paid proportionally; *A.* is entitled to recover his salary for the remainder of the quarter on the general count for work and labour. *Gandall v. Pontigny*, 1 Starkie, 198.

16. Work is to be done according to a special agreement between the parties, regulating the quantity, price, and times of payment. The parties having deviated from the original contract, and the original terms not being applicable to the new work, the plaintiff is entitled to recover on the common count, for the latter, although the time for completing the payments under the original agreement had not expired when the action was commenced. *Robson v. Godfrey and others*, 1 Starkie, 275.

17. Where work is done under a special contract, the plaintiff is not precluded recovering under the counts for work and labour generally; unless there be something in the terms of the special agreement, which either by stipulation or necessary intendment prevents him from it. *Robson v. Godfrey and another*, 1 Holt, 236.

18. A bill of exchange payable to the order of the drawer in an action by him against the acceptor, is good evidence under the money counts. *Thompson v. Morgan*, 3 Camp. 101.

19. Extra freight may be recovered under a common count for work and labour. *Hedley v. Lapage*, 1 Holt, 392.

20. If a bankrupt promises absolutely to pay a debt barred by his certificate, *indebitatus assumpsit* lies against him on the original consideration; but if he only promises conditionally, the plaintiff must declare specially and prove the condition performed. *Penn v. Bennet*, 4 Camp. 205.

When it must be special.

21. By an agreement between the plaintiffs and the defendant, the defendant was to accept of the assignment of the lease of a farm from the plaintiffs, and to take the fixtures and crops at valuation. He was afterwards let into possession of the fixtures, and the crops were valued to him; but the lease was never assigned. Held, that *indebitatus assumpsit* would not lie for the price of the fixtures and crops, and that the plaintiffs' only remedy was by a special action on the agreement. *Neal v. Viney*, 1 Camp. 471.

22. After a special agreement between *A.* and *B.* for the purchase by *A.* of unfinished houses to be finished by *B.* at his own expence, it is agreed that *A.* shall finish them, and that *B.* shall repay to him the amount of the expences; *A.* cannot recover against *B.* for such expences on the common counts in *indebitatus assumpsit* *Dunn v. Body*, 1 Starkie, 220.

23. The value of fixtures sold cannot be recovered under a count for goods sold and delivered. *Nutt v. Butler*, 5 Esp. C. 176.



24. *A.* sells beer to *B.* in casks, giving him notice that unless he returns the casks in a fortnight, he will be considered as the purchaser. *B.* does not return them within a fortnight. *A.* cannot maintain for goods sold and delivered, the whole resting in special agreement. *Lyons and others v. Barnes*, 2 Starkie, 39.

25. A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation, that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro ratâ* as far as *B.*; though he was there wrongfully dismissed by the defendant (the captain.) His remedy is by action on the special contract, or for the tortious act whereby he was prevented earning his wages. *Hulle v. Heightman*, 4 Esp. C. 77.; S. C. 2 East, 145.

General or  
special.

26. A promissory note is evidence under the money counts, only as between the original parties to it. *Wayman v. Bond*, 1 Camp. 175.

27. If by special contract a party has incurred a more extensive responsibility than what is imposed by the ordinary duties of his station, an action for neglecting such extra duty must be special. *Whalley v. Wray*, 3 Esp. C. 74.

28. Even admitting that a purchaser can recover from the vender, the expences of investigating a title which has proved defective, he cannot recover them as money paid, but only under a special count. *Camfield v. Gilbert*, 4 Esp. C. 223.

29. If *B.* by a written guarantee undertake to *A.* to answer for the payment of goods to be sent by him to *C.*, *A.* cannot maintain *indebitatus assumpsit* against *B.* for the price of goods sent to *C.* accordingly, but must declare specially on the guarantee. *Mines v. Sculthorpe*, 2 Camp. 215.

30. An auctioneer must declare specially against his principal for the costs of an action incurred through the principal's default, and not as for money paid. *Spurrier v. Elderton*, 5 Esp. C. 1.

31. If by reason of the misdescription of a promissory note in the declaration, the plaintiff is precluded from recovering upon it, *quære*, whether it be recoverable under the money counts? *Wells v. Girling*, 1 Gow. p. 22.

Money paid.

32. A sheriff's officer who discharges a defendant on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the defendant as money paid to his use. *Cerdron v. Lord Masserene, Peake*, 143.

33. A surety who gives his promissory note in payment of the debt may recover against the principal as for money paid. *Barclay and another v. Gooch*, 2 Esp. C. 571.; but see *Taylor v. Higgins*, 3 East, 169.

34. Money had and received lies by the indorsee of a note against the maker. *Dimsdale and others v. Lanchester*, 4 Esp. C. 201.

Money had and  
received.

35. If money has been obtained by means of a fraud, an action for money had and received lies to recover it back; to which it is no answer that the defendant is really entitled to the money, if his right to it depends upon a question not of common-law jurisdiction. *Crockford v. Winter*, 1 Camp. 124.

36. The assignees of a bankrupt may recover as for money had and received against the defendant, who took the goods of the bankrupt in execution (after an act of bankruptcy), and then took the goods under a bill of sale from the sheriff, although no money was actually paid. *Reed and another v. James*, 1 Starkie, 134.

37. De-

37. Declaration on a special agreement for the sale of a lease of a house; in order to recover a deposit for the purchase, the supposed agreement being unstamped, but not having been signed by either of the parties, or by the auctioneer as their agent, the plaintiff may recover for money had and received. In such case it is incumbent on the defendant to show that when the deposit was demanded by the plaintiff, he tendered an assignment of the lease. *Adams v. Fairburn*, 2 Starkie, 277.

38. Money had and received will not lie, where the plaintiff, upon the same transaction, would be liable to a cross-action to recover damages to an equal amount. *Simpson and another v. Swan*, 3 Camp. 291.

39. *Quære*, whether a person paying money on an illegal consideration can recover it back in an action for money had and received? *Pickard v. Bonner*, Peake, 221.

40. Those parts of a contract which are immaterial to the matter Declaration. in question need not be mentioned. *Phillips v. Mendez da Costa*, 1 Esp. N. P. C. 60.

41. If the parties to a written agreement enlarge the time for its performance, in an action thereon, the declaration need not notice the circumstance, but may aver performance on the original day. *Thresh v. Rake*, 1 Esp. N. P. C. 53.

42. A release may be given in evidence under *non-assumpsit*. Pleading. *Miller v. Aris*, 3 Esp. C. 234. *Hawley v. Peacock*, 2 Camp. 557.

43. The defendant cannot give his bankruptcy in evidence under the general issue of *non-assumpsit*. *Gowland v. Warren*, 1 Camp. 363.

44. In *assumpsit* by the indorsee against the acceptor, the bankruptcy of the indorser, at the time of indorsement, may be given in evidence under the general issue. *Pinkerton v. Adams and another*, 2 Esp. C. 611.

45. Under a plea of the general issue to an action of *assumpsit* against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was then married to another husband who is still alive. *Cowley v. Robertson and wife*, 3 Camp. 438.

46. Payment after issue joined may be given in evidence under the general issue in *assumpsit*, and need not be pleaded as matter having arisen *puis darrein continuance*. *Storey v. Bloxam*, 2 Esp. C. 504.

47. A release given after issue joined in *assumpsit* must be pleaded specially as matter having arisen *puis darrein continuance*. *Storey v. Bloxam*, 2 Esp. C. 505.

48. It seems that an award between the parties made after issue joined on *non-assumpsit*, must, if the plaintiff proceeds, be pleaded as matter having arisen *puis darrein continuance*, and cannot be given in evidence under the issue. *Storey v. Bloxam*, 2 Esp. C. 504.

49. Where work is done upon a special contract, and for estimated prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is to be the rule of payment as far as the special contract can be traced, and for any excess beyond it, the party is entitled to his *quantum meruit*. *Robson v. Godfrey and another*, 1 Holt, 236. Evidence.

## ATTORNEY.

## Duties of.

1. An attorney retained to defend an action is not bound to follow the instructions of his client to do what is meant merely for delay. 1 Camp. 176.

## Rights of.

2. If an attorney's clerk is employed to conduct a cause, who, not being himself an attorney, employs his master, the master may sue the client for his expences, unless he has previously paid the clerk. *Brown v. Brooks*, 1 Esp. C. 388.

3. An attorney cannot use the name of his client to try whether he is entitled to the costs of proceedings. *Charlwood and another v. Berridge*, 1 Esp. C. 345.

4. An attorney cannot delegate his authority; and, therefore, cannot demand payment by his clerk. *Coore v. Calloway*, 1 Esp. N. P. C. 115.

5. If damages to the amount of the consideration money are recovered against an attorney by the grantee of an annuity made void through his negligence, for want of a proper registration, the attorney is not entitled to the consideration money from the grantor. *Burdon v. Webb*, 2 Esp. C. 527.

## Liabilities of.

6. An attorney who undertakes in writing generally, and not as attorney, is personally liable. *Kendray v. Hodgson*, 5 Esp. C. 228.

7. An attorney employed to purchase and prepare the assignment of an annuity, before the decisions holding that the trusts in the annuity deeds must be particularly set forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void because the memorial omitted particularly to specify the trusts of the annuity deeds. *Baikie v. Chandless*, 3 Camp. 17.

## Bill of.

8. An attorney cannot maintain an action, even for the money out of pocket in a cause, until he has delivered a bill signed. *Miller v. Towers, Peake*, 102.

9. An attorney must deliver his bill a month beforehand, pursuant to statute 2 G. 2. c. 23., though all the items are for business done at the quarter sessions. *Clarke v. Denovan*, 1 Esp. N. P. C. 137.

10. If any part of an attorney's bill is for business done in court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover. *Benton v. Garcia*, 3 Esp. C. 149.

11. An attorney cannot maintain an action for preparing a warrant of attorney, unless a bill has been delivered pursuant to 2 G. 2. c. 23. s. 23. *Sandon v. Bourn*, 4 Camp. 68.

12. If one item of an attorney's bill be for preparing a warrant of attorney to confess a judgment, a bill must be delivered according to the statute 2 G. 2. c. 23. s. 23., although the warrant has not been executed. *Weld v. Crawford*, 2 Starkie, 538.

13. An agent to a country attorney is not obliged to deliver a bill signed. *Bridges v. Francis, Peake*, 1.

14. Where one attorney employs another as agent, he may sue him for his fees without first delivering a bill pursuant to statute 2 G. 2. c. 23. *Nelson v. Garforth*, 1 Esp. N. P. C. 221.

15. Where business has been done by an attorney for a client, who afterwards becomes himself an attorney, the former need not deliver a bill pursuant to statute 2 G. 2. c. 23., in order to recover his costs. *Ford v. Maxwell*, 1 Esp. C. 420.; *S. C. Hen. Bl.* 589.

16. The statute 2 G. 2. c. 23. s. 23. only requires the delivery of an attorney's bill for the *bringing* of an action; therefore, to enable an attorney to set off his bill, he need not deliver it a month beforehand, though he must deliver it time enough before trial for the plaintiff to have it taxed. *Bulman v. Birkett*, 1 Esp. C. 449.

17. Where two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill, in pursuance of 2 G. 2. c. 23., to one of them from whom he received his instructions, and to whom the management of the business was left by the other. *Finchett v. How*, 2 Camp. 277.

18. *Aliter* of a delivery to that one who did not intermeddle; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill. *Finchett v. How*, 2 Camp. 277.

19. Delivery of an attorney's bill to the attorney of the party to be charged is sufficient, if the party himself attend the taxation, or the bill be shown to have come to his hands. *Warren v. Cunningham*, 1 Gow. 11.

20. An attorney's bill, if not delivered to the party, must be left for him at his dwelling-house or last place of abode; leaving it at the counting-house is not sufficient. *Hill v. Humphrys*, 3 Esp. C. 254.; S. C. 2 B. & P. 343.

21. Although an attorney shows his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is still bound to leave a copy of the bill with him, according to the provisions of statute 2 G. 2. c. 23., before he can maintain an action upon it. But where several are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient to maintain a separate action against any of the others. Money paid by an attorney for costs which his client is adjudged to pay, is a disbursement within 2 G. 2. c. 23. *Crowder v. Shee*, 1 Camp. 437.

22. Previous to the bringing an action on an attorney's bill, it is sufficient under the statute 2 G. 2. c. 23. s. 23. to deliver a bill at the defendant's last known apparent place of abode at the time when the bill was delivered. And it is not sufficient for the defendant to show, that he had another known place of abode subsequently to the delivery of the bill. *Wadson v. Smith*, 1 Starkie, 324.

23. The month which must elapse after the delivery of an attorney's bill, previous to an action thereon, is a lunar month. *Hurd v. Leach*, 5 Esp. C. 168.

24. An action may be maintained by an attorney against an assignee for business done under a commission of bankruptcy, although the bill has not been taxed by a master in chancery under the statute 5 Geo. 2. c. 30. s. 45. *Tarn v. Heys and another*, 1 Starkie, 278.

25. If the joint names of two attorneys in partnership are put on their papers in causes in their office, either of them is liable to the penalties of statute 37 G. 3. c. 90., for practising as an attorney without entering his certificate, though it does not appear that one of them had any profit or advantage from the suit for which the *qui tam* action is brought. *Edmonson v. Davis*, 4 Esp. C. 14.

26. A power of attorney, though coupled with an interest, is instantly revoked by the death of the grantor; and an act afterwards *bona fide* done under it, by the grantee, before notice of the death of the grantor, is a nullity. *Watson and wife v. King*, 4 Camp. 272.

Practising without certificate.

Warrant of attorney.

27. A power of attorney is not revocable where given as part of as security. *Walsh v. Whitcomb*, 2 Esp. C. 565.

### AUCTIONEER.

#### Duty of.

1. Where an auctioneer declares that the conditions are as usual, and those conditions are pasted up under his box, the purchaser is bound. *Mesnard v. Aldridge*, 3 Esp. C. 271.

#### Liabilities of.

2. An auctioneer is not answerable for loss or damage, if he takes the same care of the property that a prudent man would of his own. *Maltby v. Christie*, 1 Esp. C. 340.

3. An auctioneer who sold goods after notice that they were not the property of his employer, was held liable to pay the money for which they had sold. *Hardacre v. Stewart*, 5 Esp. C. 103.

4. Where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract. If the conditions of sale are, that a certain sum *per cent.* shall be paid as a deposit, and the auctioneer accepts a less sum, he cannot afterwards object that too little was paid. *Hanson v. Roberdeau*, Peake, 120.

5. An auctioneer is not liable to pay interest upon a deposit kept in his hands upon the investigation of a title. Here he is to be considered as the mere agent, unless he specially engage as a principal in the sale. *Lee v. Munn*, 1 Holt, 569.

6. A declaration in *assumpsit* against an auctioneer for having rescinded a contract of sale (which he had made), contrary to his duty as auctioneer, may be supported by implication of law arising upon the facts of the employment of the auctioneer by the plaintiff, and his sale of the goods, without proof of an express contract on his part not to rescind the contract. In such case it is incumbent on the defendant to establish a legal excuse for deviating from the usual practice, although the proof involve the proof of a negative. *Nelson and another v. Aldridge*, 2 Starkie, 435.

#### Right to remuneration.

7. If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor. *Denew v. Daverell*, 3 Camp. 451.

8. *Quære*, whether an auctioneer is entitled to an allowance beyond a reasonable compensation, though warranted by the course of trade? *Maltby v. Christie*, 1 Esp. C. 340.

### AVERAGE.

#### What are not subjects of general average.

1. The expenditure of ammunition in resisting capture by a privateer, the damages done to the ship in the combat, and the expence of curing the wounded sailors, are not the subject of general average by the law of England. *Taylor and others v. Curtis*, 6 Taunton, 608.; S. C. 2 Marshall, 309.; S. C. 4 Camp. 337.; S. C. 1 Holt, 192.

2. Where the master of a ship in a foreign port was arrested by process out of a court of justice, at the suit of the agent of the ship for sums of money the latter had disbursed on her account; and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of

of the cargo : held, that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board, which arrived safely at the port of destination. *Dobson and others v. Wilson*, 3 Camp. 480.

3. An action at law may be maintained to recover a contribution, in the nature of general average, by one shipper of goods against another. *Dobson and others v. Wilson*, 3 Camp. 480. Action for.

### BAIL.

1. If a party executes a bail-bond before the condition is filled up, it is void. *Fowell v. Duff*, 3 Camp. 181. Bond.

2. Although it be irregular to bring an action on a bail-bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of *non est factum*. *Wright v. Walmsley*, 2 Camp. 396.

3. If a sheriff's officer liberates a defendant on his attorney undertaking put in bail, which he neglects to do, whereupon the sheriff is attached, and the officer pays the debt, *quære* whether the statute of bail-bonds, 23 Hen. 8. —, does not preclude him recovering the money paid against the defendant? At all events he cannot, unless an attachment has issued against the sheriff, or he has otherwise been *compelled* to pay. *Griffin v. Roberts*, 1 Esp. C. 383.

4. A justification of bail is to be taken *nunc pro tunc*, so that if out of time, application should be made to set it aside; otherwise the plaintiff subjects himself to all the consequences of a valid justification: amongst others, an action against the sheriff for not taking a bail-bond brought before justification will be defeated by producing the rule for the allowance of bail. *Murray v. Durand*, 1 Esp. N. P. C. 87. Justification.

5. Bail above put in by the sheriff (who had discharged the defendant without a bail-bond) may surrender the defendant. *Rex v. Butcher*, Peake, 169. Surrender.

6. Bail may recover against their principal all expences necessarily incurred from becoming bail. *Fisher v. Fallows*, 5 Esp. C. 171. Right to remuneration.

7. If a party who is bail to the sheriff apply to an attorney to put in bail above, he is liable for these expences, but not for the subsequent expences of the suit: *prima facie* the expences of the suit are due from the principal, and the charges of the bail, for putting in bail above, from the bail. *Hector and another v. Carpenter*, 1 Starkie, 190. Liabilities of.

### BAILMENT.

1. Goods are delivered to a bailee on a contract of a sale and return; the bailee has no authority to pledge the goods. Application of the statute 21 J. 1. c. 19. s. 10. to such a case. *Delauney v. Barker*, 2 Starkie, 539. Notice of bailee.

2. After a hired horse is exhausted and has refused its feed, the hirer is bound not to use it. *Bray v. Mayne*, Gow, 1. Duties of bailee.

3. A bailee for hire is not answerable for the loss of the property, if he took the same care of it that a prudent man would take of his own; not though the loss arises from the embezzlement of his servants. *Finucane v. Small*, 1 Esp. C. 315. Liabilities of bailee.

4. A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself, to preserve it from any unexpected danger to which it may be exposed. *Leck v. Maestaer*, 1 Camp. 138.

5. A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge. *Cailiff v. Danvers*, Peake, 114.

6. A wharfinger's liability is at an end by delivering the goods on the wharf to the mate, or other accredited person of a ship by which they are to be sent, if according to the usage of the trade. *Cobbon and another v. Downe*, 5 Esp. C. 41.

7. A person who takes in horses to agist, does not, like an inn-keeper, insure their safety; he is answerable only in case of negligence. *Broadwater v. Blot*, 1 Holt, 547.

8. A watchmaker is bound to secure property placed in his hands in the way of his trade, or to protect it against depredations that may be committed by the persons in his employ. Therefore where *A.* entrusted *B.* (who was a chronometer maker,) with a chronometer to be repaired, and *B.* suffered his servant to sleep in the shop in which the chronometer was deposited, *B.* was held liable to *A.* for its value, *B.'s* servant having stolen it, and *B.*, at the time when the theft was committed, having deposited his own watches in a more secure place than that in which the chronometer was left. *Clarke, Esq. v. Earnshaw*, 1 Gow, 30.

9. *A.* lends a picture to *B.*, who wishes to show it to *C.*; *B.* without any previous communication to *C.*, and without his knowledge, sends the picture to his house, where it is accidentally injured. *C.* is not responsible in *assumpsit* for not keeping the picture safely. *Lothbridge v. Phillips*, Knt., 2 Starkie, 544.

10. If upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse; but if instead of that, he prescribes for the horse himself, and from unskillfulness gives him a medicine which causes his death, although acting *bona fide*, he is liable to the owner of the horse as for gross negligence. *Deane v. Keate*, 3 Camp. 4.

## BARON AND FEME.

### Relation of.

1. If a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessities supplied to her, by proving a previous marriage between himself and another woman still alive; unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessities to the second wife. *Robinson v. Nahon*, 1 Camp. 245.

2. If a man holds out a woman as his wife, he is liable on her contracts the same as if they were married, even though the other party knew that they were not. *Watson v. Threlkeld*, 2 Esp. C. 637.

3. After a sentence of divorce *ab initio*, the liability of a husband for the debts of his wife does not continue. *Anstey v. Manners*, 1 Gow, 10.

### Effects of the relation.

4. Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment

payment of a debt which he owed him in the course of carrying on a trade in her own name by the consent of her husband, yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff. *Barlow v. Bishop*, 3 Esp. C. 266.; S. C. 1 East, 432.

5. The furniture of a house, the separate property of the wife, having been taken in execution by the husband's creditor, they are sold by the sheriff to a trustee for the wife's separate use. Held, that notwithstanding the husband afterwards remained as before in possession of them, they were not liable to his debts. *Cross v. Glode* and another, 2 Esp. C. 574. Separate property.

6. Although *A.* cohabits with *B.* and assumes his name and passes for his wife, and permits him to appear to be the owner of the furniture of the house in which they live, the furniture being her property, is not liable to be taken under an execution against *B.* *Edwards v. Bridges* and another, 2 Starkie, 396.

7. Where a wife executes a deed without her husband's authority, any claim which the other party has against him arises out of an implied simple contract of the terms of which the deed, though void, may be used as evidence. *White v. Cuyler*, 1 Esp. N. P. C. 200.; S. C. 6 T. R. 176. Contract by feme.

8. A debt due from the wife *dum sola* cannot be set off against a demand by the husband alone, unless he has promised (upon sufficient consideration) to discharge it. *Wood v. Akers*, 2 Esp. C. 594.

9. Though a husband is not bound to maintain the child of his wife by a former marriage, yet if he receives it under his roof and holds it out as part of his family, he will be liable, on a contract duly made by her, for its education or the like. *Stone v. Carr*, 3 Esp. C. 1. Children by a former marriage

10. If from her husband's ill treatment a wife is obliged to leave the house, he is liable to any one who supplies her with necessaries. *Hodges v. Hodges*, 1 Esp. C. 441. Necessaries.

11. If the wife has been obliged by her husband's misconduct, to take up necessary things on credit he must pay for them, though he may previously have warned the tradesman not to trust her. *Harris v. Morris*, 4 Esp. C. 41.

12. If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. *Shepherd v. Mackoul*, 3 Campbell, 326.

13. Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence: held that he was liable to an attorney, whom she employed to defend her, and by whom he knew that she was defended. *Shepherd v. Mackoul*, 3 Campbell, 326.

14. Where a separate maintenance is secured to the wife, by a deed executed by herself and husband only, the husband is liable for necessaries supplied to her. *Ewers v. Hutton*, 3 Esp. C. 255.

15. The husband is liable for necessaries furnished to his wife, where she lives apart with a separate maintenance duly paid to her, unless the creditor has notice of the maintenance. *Rawlins v. Vandyke*, 3 Esp. C. 250. But see *Ham. Parties to Actions*, 195.

16. A husband who allows his wife a separate maintenance promises to pay the amount of a debt which she contracts in a state of separation, he cannot afterwards recede from his promise on the ground that the plaintiff knew that he allowed his wife a separate maintenance,



maintenance, and that he made the promise under a misapprehension of law. *Hornbuckle v. Hornbury*, 2 Starkie, 177.

17. In an action against the husband for lodging and necessaries supplied to his wife, who lives separately from him without any fault of her own, and who is possessed of funds of her own; the question is, whether she has such means as are adequate to her support, according to her husband's situation in life. *Ludlow v. Wilmot*, 2 Starkie, 85.

18. Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman, for which he would not otherwise be liable, he assents to the contract, if, having any controul over the goods, he does not cause them to be returned to the vender. *Waithman v. Wakefield*, 1 Camp. 120.

19. But if a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious enquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which those enquiries would have shown him to be responsible. *Waithman v. Wakefield*, 1 Camp. 120.

20. Where the husband, separated from his wife, suffers their children to reside with her, he is liable for necessaries lawfully supplied to her for them. *Rawlins v. Vandyke*, 3 Esp. C. 252.

21. Though a wife has committed adultery, yet if the husband receives her again, he is liable for necessaries lawfully supplied to her after their re-union. *Harris v. Morris*, 4 Esp. C. 41.

22. Whether articles furnished to the wife are necessaries, depends, not upon her marriage portion, but the husband's circumstances. *Ewers v. Hutton*, 3 Esp. C. 256.

23. A husband is liable for necessaries furnished to his wife, suitable to the appearance in life he permits her to assume, though greatly beyond his degree or his circumstances. 1 Camp. 120.

24. If husband and wife live separate, and he pays her an adequate allowance for her support, he is not liable to be sued for her debts, although the separation be not by deed, and there be no written agreement between them with respect to the allowance. The adequacy of the allowance is a question of fact for the jury. *Hodgkinson and another v. Fletcher*, 4 Camp. 70.

25. Although a man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife; when they have separated he is not liable for necessaries supplied to her on the ground that he has lived with her and represented her as his wife, if he can show that in point of fact they were not married. *Munro v. De Chemant*, 4 Camp. 215.

Feme sole.

26. The wife of one transported for his crimes may sue as a *feme sole*, notwithstanding his term of transportation has elapsed, unless the defendant can show that he has returned to this country. *Carrol v. Blencow*, 4 Esp. C. 27.

Separation.

27. *Semble*, that in those times in which it was considered that a *feme covert* separated from her husband was liable as a *feme sole*, it was necessary that her separate maintenance should be secured by deed and in trust. *Stedman v. Gooch*, 1 Esp. N. P. C. 7.

28. Held that the wife of a foreigner who had gone and is still resident abroad, but with the intention of returning, is liable as a *feme sole*, for debts contracted after his departure. *Walford v. Duchesse de Prenne*, 2 Esp. C. 554.; *Franks v. Same*, id. 587. But see 3 Camp. 123.

29. A woman, by birth an alien, and the wife of an alien, cannot  
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be sued as a *feme sole* if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state. *Kay v. Duchesse De Prenne*, 3 Camp. 123.

30. A wife, not separated from her husband, cannot be charged with credit given to her, though her husband is resident abroad, has regularly supplied her with money, and though she has represented herself as a single woman. *M'Namara and wife v. Fisher*, 3 Esp. C. 18.

31. A woman who has declared herself to be a *feme sole*, and as such has executed deeds and maintained actions; if herself sued as a *feme sole*, is not estopped from setting up the defence of coverture. *Davenport, v. Nelson*, 4 Camp. 26. Estoppel.

32. A husband who allows his wife to transact his business, makes her his agent, and is therefore bound by her acts. *Girardy v. Richardson*, 1 Esp. N. P. C. 13. Agency.

33. A husband, by permitting his wife to transact his business, places her on the footing of any other agent, and is therefore bound by her acts, and admissions respecting it. *Emerson v. Blonden*, 1 Esp. N. P. C. 142.

34. In cases where an authority from the husband to the wife to indorse bills received by her in the course of her separate trade or otherwise, may be implied; the indorsement must be in the husband's name, even though the bill is payable to the wife. *Barlow v. Bishop*, 3 Esp. C. 266.; S. C. 1 East. 432.

35. If a promissory note is made payable to a married woman, and she indorses it for value in her own name, and the maker afterwards promises to pay it; in an action against him by the indorsee, it will be presumed, that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff. *Cotes v. Davis*, 1. Camp. 485.

36. A debt contracted by the wife before marriage survives against her upon the death of her husband. *Woodman v. Chapman*, 1 Camp. 189. Survivorship.

37. No action lies for harbouring the plaintiff's wife, where she is kept by the defendant from a principle of humanity, to secure her from the ill treatment of her husband. *Philip v. Squire, Peake*, 82. Harboursing wife.

38. If a wife through her husband's ill treatment is obliged to quit the house, any person may safely receive and protect her. *Berthon v. Cartwright*, 2 Esp. C. 480.

39. Where a defendant is under terms not to give coverture in evidence, she is precluded from showing that the demand was furnished on the husband's credit. *Sneil v. Rice*, 1 Esp. C. 222.; *Peake*, 235. Pleadings.

## BARRISTER.

1. No action lies to recover back a fee given to a barrister to argue a cause which he did not attend. *Turner v. Phillips, Peake*, 122. Fee.

2. No action lies against a barrister for misconduct. *Fell v. Misconduct. Brown, Peake*, 96. Misconduct.

## BASTARD.

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## Maintenance.

1. The father of a natural child having adopted it, is liable to one who furnishes it with necessaries in cases where he would have been liable had it been legitimate; even though no order of filiation has been made. *Hesketh v. Gowing*, 5 Esp.C. 131.

2. In an action of *assumpsit* on an express promise to pay for the maintenance of a bastard child of which the defendant was the putative father, it is no defence that he has since discovered that the child was not begotten by him. *Shaw v. Whiteman*, Peake, 29.

3. If the putative father of a bastard child agrees to indemnify the parish they may demand any security they think proper. *Dickinson v. Brown*, Peake, 234.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

## What are.

1. A draft in this form, "Mr. *A.* will much oblige Mr. *B.* by paying to *C.* or order 20*l.* on his account," is a bill of exchange. *Ruff v. Webb*, 1 Esp. N.P.C. 129.

2. A promissory note without the words "or order," is a note within the statute of Ann. *Smith v. Kendal*, 1 Esp.C. 231.

3. An instrument in the common form of a bill of exchange, except that the word *at* is substituted for *to*, before the name of the drawees, may be declared on as a bill of exchange, or *comme semble*, may be treated as a promissory note, at the option of the holder. *Shuttleworth v. Stephens*, 1 Camp. 407.

4. An instrument which appears on common observation to be a bill of exchange, may be treated as such, although words be introduced into it for the purpose of deception, which might make it a promissory note. *Allan v. Mawson*, 4 Campbell, 115.

5. An agreement indorsed on a note, by which the plaintiff, the payee undertaking to enlarge the time for payment specified in the body of the note, cannot be considered as incorporated with the note so as to render an agreement stamp necessary. *Stone v. Metcalf*, 1 Starkie, 53.

## What are not.

6. Upon an instrument in the common form of a joint and several promissory note, signed by three persons, there is an indorsement written at the time of signing it, stating that the note is taken as a security for all balances to the amount of the sum within specified which one of the three might happen to owe to the payee; that the note should be in force six months, and that no money should be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare upon this instrument as a promissory note, payable either on demand, or at six months after date. Between these parties, the instrument is an agreement, and must be stamped and declared upon as such. *Leeds v. Lancashire*, 2 Camp. 205.

7. An instrument acknowledging the receipt of drafts for the the payment of money, and promising to repay the money, is a special agreement and not a promissory note. *Williamson v. Bennett*, 2 Camp. 417.

8. A note promissory to pay *I.F.* or order a sum certain, the amount of the purchase money of a quantity of fir belonging to *H.*, with an indorsement thereon at the time of making the note, that  
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it was given on condition that it should be void, if any dispute should arise between *H.* and *W.* respecting the fir, was held not to be a promissory note within statute 3 and 4 Ann. c. 9. *Hartley v. Wilkinson* and another, 4 M. & S. 25.; S. C. 4 Camp. 127.

9. An instrument by which the party promises to pay the sum of 65*l.* and also such other sum as by reference he owed to another with interest, cannot be considered as a promissory note, even as to the 65*l.*, and cannot be given in evidence under the count, upon an account stated without an agreement stamp. *Smith and his wife v. Nightingale*, 2 Starkie, 375.

10. The giving a bill of exchange in payment of a demand is conclusive as to the existence and reasonableness of the different items which compose it, so that these cannot be questioned in an action on the original demand brought on dishonour of the bill. *Knox v. Whalley*, 1 Esp. N. P. C. 159.

Their legal effect.

11. A promissory note signed by two persons and beginning "I promise, &c." is joint and several. See *Mansel v. Burrell*, 7 T. Rep. 352. as to joint and several promises. *March v. Ward, Peake*, 130.

Construction.

12. A note beginning "I promise to pay," signed by two parties, is joint and several. *Clerk v. Blackstock*, 1 Holt, 474.

13. The payee of a note indorses upon it, "My will and desire is, that the money shall not be called in for two years, &c. and that if the said *C. S.* shall wish for further time, he shall have it without suit at law until three years next after my decease;" semble, these are words of mere indulgence and favour, and do not operate as a defeasance. *Stone v. Metcalf*, 1 Starkie, 53. *Quære?* what their effect would be as between the maker and the executors of the payee *Ibid.*

14. A man who at the request of the holder of a note has put his name upon it, and thereby been obliged to pay the contents to a *bona fide* holder, may recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration. *Seddons v. Stratford, Peake*, 215.

Consideration.

15. Unless where a bill or note given for an illegal consideration is declared by law to be void, as in the cases of gaming and usury; it is valid in the hands of a *bona fide* holder; nor will it be necessary for him, on proof of the original transaction, to show that he gave a consideration for it, unless circumstances are likewise adduced by which he appears to have been implicated with or to have known of the transaction. If he was really a party concerned, the security is void in his hands. *Wyat v. Bulmer*, 2 Esp. C. 538. *Newby v. Smith*, Id. 539, n.

Valid and void.

16. Where the drawers of a banker's check issued it nine months after it bore date, upon a consideration which afterwards failed as between them and the persons to whom they delivered it, they cannot be permitted to object this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice; though by the general rule any person receiving a negotiable instrument after it is due, is deemed to have taken it upon the credit of the person from whom he received it, and subject to the same equities as between him and the party sued on such instrument. *Boehm and others v. Stirling and others*, 2 Esp. C. 575.; S. C. 7 T. R. 423.

17. A bill given by a principal to a stock-broker for the amount of differences on a stock-jobbing transaction, which the broker had paid, is not available in the hands of one who took it of the broker after it was due. *Brown v. Turner*, 2 Esp. C. 631.

18. If a bill is accepted for a particular purpose, one to whom the payee indorsed it with full knowledge of the circumstance cannot sue the acceptor. *Sikes and others v. Marshal*, 2 Esp. C. 705.

19. A bill of exchange good in its original, but indorsed on a usurious consideration, is available in the hands of a subsequent *bona fide* indorsee for value, who took it before it was due. *Parr v. Eliason and others*, 3 Esp. C. 210.; S. C. 1 East, 92.

20. Whether under an agreement between *A.* and *B.* for the sale of a lease, *B.* accepts a bill for the purchase money and is let into possession of the premises, it is no defence to an action by *A.* against *B.* upon the bill, that *A.* refused to execute an assignment of the lease according to the agreement. *Moggridge v. Jones*, 3 Camp. 38.

Conditional.

21. If a cheque is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment of the cheque. *Wienholt v. Spitta and others*, 3 Camp. 376.

22. The drawer and payee of a bill of exchange after it has become due indorses it to *B.* on condition that he will take up certain bills discounted by the payee. *B.* does not take up the bills but transfers the bill in question to *C.*, the latter may recover against the acceptor. *Wright v. Hay*, 2 Starkie, 398.

Indorsement.

23. When the payee of a bill of exchange, has made an indorsement in blank thereon, no subsequent indorsee can restrain its negotiability by a special indorsement. *Smith v. Clarke, Peake*, 226.

Negotiation.

24. After an indorsement in blank by the original payee, the negotiability of the bill cannot be limited by any subsequent special indorsement. *Smith and another v. Clarke*, 1 Esp. N. P. C. 180.

Who liable on.

25. A banker who discounts a bill in notes which he does not indorse, is not liable on their being dishonoured. *Fyddell v. Clark and another*, 1 Esp. C. 447.

26. An indorsement in these words, "Pay the contents of the bill to *J. S.*, being part of the consideration in a certain deed of assignment, executed by the said *J. S.* to the indorser and others," is not restrictive. *Potts v. Reed*, 6 Esp. C. 57.

27. The acceptor of a bill of exchange payable to *A.* and *B.*, who has accepted it after it was indorsed by *A.* for himself and *B.*, cannot contend in an action at the suit of the indorsee, that the payees were not partners, and that the bill should have been indorsed by both. *Jones v. Radford*, 1 Camp. 83. n.

28. If *A.* the payee of a bill of exchange indorses it in blank, and delivers it to *B.*, and *B.* writes above *A.*'s indorsement, "Pay the contents to *C.*," *B.* is not liable to *C.* as an indorser of the bill. *Vincent v. Horlock*, 1 Camp. 442.

29. *A.* the drawer of a bill of exchange payable to his own order, being indebted to *B.* on another bill for which he is bound to provide, indorses the first bill to *B.* to enable him to raise money upon it in order to take up the second bill: this is an available security in the hands of *B.* in reduction of his demand on *A.*, and he may recover upon it against the acceptor. *Walsh v. Tyler*, 2 Starkie, 288.

Presentment.

30. A bill or note payable at a third person's house is dishonoured by a refusal there, since the other has made him his agent, and is therefore bound by his acts. *Stedman v. Gooch*, 1 Esp. N. P. C. 3.

31. A demand of payment before the day on which a bill is payable is a nullity. Thus a demand on the second instead of the third day of grace. *Wiffen v. Roberts*, 1 Esp. C. 261.

32. Where a bill is made payable at a certain house, a presentment at the house is sufficient. *Brown v. McDermot*, 5 Esp. C. 265.

33. Where

33. Where a bill is accepted payable at a bankers it must be presented for payment within the hours of business, if by the known custom of the place, bankers begin and leave off business at stated hours. *Parker v. Gordon*, 6 Esp. C. 41.; S.C. 7 East, 385.

34. A banker in London who receives a cheque by the general post, is not bound to present it for payment till the following day. *Rickford v. Ridge*, 2 Camp. 357.

35. The presentment of a bill of exchange for payment at the house of a merchant residing in London at 8 o'clock in the evening of the day it becomes due, is sufficient to charge the drawer. *Barclay v. Bailey*, 2 Camp. 527.

36. If a bill of exchange is accepted, "payable at Messrs. A. B. and Co.'s," who are bankers in the city of London, a presentment of the bill for payment to their clerks at the clearing house, is sufficient. *Reynolds v. Chettle*, 2 Camp. 596.

37. A bill of exchange payable at a banker's in London, which, by reason of being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid, was held not to be discharged, but that the drawer might set it off in an action brought against him by the acceptor, although the bankers at whose house the bill was payable failed in the interval, and the acceptor had at all times up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. *Sebag v. Abitbol*, 4 M. & S. 402. S. C. 1 Starkie, 79.

38. Presentment of a bill of exchange at a counting-house (where it is made payable) between 6 and 7 o'clock in the evening, is sufficient. *Morgan v. Davison*, 1 Starkie, 114.

39. A presentment of a bill at a banker's where it is payable is sufficient, although made after banking hours, provided a person be stationed by the banker to return an answer. *Garnett v. Woodcock and others*, 1 Starkie, 475.

40. The holder of a bill of exchange applies to the drawee on the day before the bill becomes due, who informs him he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day; on the next day the drawer informs the holder that he will endeavour to provide effects and will call upon him again; this does not supersede the necessity of a presentment on that day. *Prideaux v. Collier*, 2 Starkie, 57.

41. A banker's promissory note is made payable at Tunbridge, and likewise at London, the holder has a right to present it at either place, and if payment be refused in London, it is no defence on the part of those who contend that the holder has been guilty of laches, to prove, that if payment had been demanded at Tunbridge, which was the more convenient and nearer place, the bill would have been paid. *Beeching and others v. Gower*, 1 Holt, 313.

42. If a bill is drawn payable at so many days after sight, there is no fixed time when it shall be presented to the drawer; and it may be put into general circulation by the holder without a previous presentment. *Groupy v. Harden*, 1 Holt, 342.

43. But *semble*, a presentment must notwithstanding be made within a reasonable time. *Groupy v. Harden*, 1 Holt, 342.

44. That an act may amount to an implied acceptance it must be such as naturally raises a belief of an intention to accept; therefore to say, on returning a bill left for acceptance, "There is your bill, it is all right," is not an acceptance. *Powell v. Jones*, 1 Esp. N. P. C. 17.

Acceptance.

45. That

45. That an answer at the drawee's house who was not at home, that the bill would be taken up when due, may amount to an acceptance, it must be proved to have been given by his authority express or implied. *Sayer v. Kitchen*, 1 Esp. N. P. C. 209.

46. Though a person sued as acceptor of a bill, prove that the acceptance was forged, yet if it appear that he and the party who committed the forgery had been connected in business, and that the defendant had paid other bills drawn by such party and accepted similarly to that on which the action is brought, it will be sufficient to show that he adopted the acceptance and rendered himself liable to pay the bill. *Barber v. Gingell*, 3 Esp. C. 60.

47. If the drawee write an acceptance on a bill left with him by the holder, he cannot revoke such acceptance, even while the bill remains in his possession, and before it is called for by the holder. *Thornton and another v. Dick and another*, 4 Esp. C. 270. See 6 East, 199.

48. If a bill of exchange is sent for acceptance to the drawee, and he retains it in his possession contrary to the usual mode of dealing between himself and the holder, this amounts to an acceptance. *Harvey v. Martin*, 1 Camp. 425. n.

49. But by the usage of trade in London, a cheque may be retained by the banker on whom it is drawn, till five in the afternoon of the day on which it is presented for payment, and then returned, although it has previously been cancelled by mistake. *Fernandez v. Glynn*, 1 Camp. 426, n.

50. The holder of a bill of exchange may insist upon the drawee accepting it, generally in the very words in which it is drawn, or may protest for non-acceptance. *Boehm v. Garcius*, 1 Camp. 425. n.

51. If a bill of exchange be accepted by the drawee, another person who, for the purpose of guaranteeing his credit, likewise accepts the bill in the usual form, is not liable as acceptor, but must be sued upon his collateral undertaking. *Jackson v. Hudson*, 2 Camp. 447.

52. Where the drawee of a bill of exchange who has once refused to accept it, said to the holder, "If you will send it to the counting-house again, I will give directions for its being accepted," held that he was not liable as acceptor without evidence that the bill was again sent back to his counting-house for acceptance. *Anderson v. Hick*, 3 Camp. 179.

53. A promise to accept a bill of exchange in a letter written before the bill is drawn, can only be taken advantage of as an acceptance by a person to whom the letter was communicated, and who took the bill on the credit of it. *Miln v. Prest*, 4 Camp. 393.

54. Where the drawee of a bill of exchange drawn on account of a cargo of wheat consigned to him, said when the bill was presented to him for acceptance, "it will not be accepted until the ship with the wheat arrives," held that on the arrival of the ship with the wheat this amounted to an actual acceptance. *Miln v. Prest*, 4 Camp. 393.

55. The drawee of a bill of exchange being advised of the drawing the bill by the drawer, and requested to honour it, answers by letter that "the bill shall meet attention;" this does not amount to an acceptance, although it appears that in other instances the drawee has used the same expression when bills have been drawn upon him. *Rces and another v. Warwick*, 2 Starkie, 411.

56. Freight

56. Freight is to be paid for in good bills, and the bills are given by the charterers which are put into circulation by the ship-owners. This amounts to an acceptance of the bills, and discharges the lien; and an application to renew such bills on condition that the lien shall remain, will not operate to the continuance of the lien, unless the charterers knew that the bills had been circulated. *Horncastle v. Farran*, 2 Starkie, 590.

57. An acceptance is as valid by parole as by writing, and a conditional acceptance is as effectual as an absolute one, if the condition be complied with. *Miln v. Prest and another*, 1 Holt, 181.

58. A promise by letter to accept a non-existing bill is no acceptance of a bill when drawn, unless it be communicated to the person who is to receive the bill, and who is thereby induced to take it. *Miln v. Prest and another*, 1 Holt, 181.; S. C. 4 Camp. 393.

59. If the holder of a bill of exchange agree not to sue the acceptor upon his making affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit be false. *Aliter* if the affidavit be not sworn. *Stevens v. Thacker*, Peake, 187.

60. If a bill of exchange is indorsed before it becomes due, after payment of part, the indorsee, ignorant of the payment, is not bound by it. *Cooper v. Davies*, 1 Esp. C. 463.

61. Agreeing after a bill has become due and been regularly protested for nonpayment, and notice thereof given, not to press the acceptor, will not discharge the drawer. *Walwyn v. St. Quintin*, 2 Esp. C. 517.; S. C. 1 B. & P. 652.

62. An indorsee who has taken the bill, knowing that it was drawn for the accommodation of the indorser, may, notwithstanding he has compounded with the indorser, and covenanted not to sue him, sue the maker. *Mallet v. Thompson*, 5 Esp. C. 178.

63. Discharging any of the indorsers will be a discharge of all subsequent, though not of prior indorsers. *Smith v. Knox*, 3 Esp. C. 46.

64. The giving time to any of the parties to a bill, is a discharge of every other party, who upon paying the bill or note, would be entitled to sue the party to whom time has been given. *English v. Darley*, 3 Esp. C. 49.; S. C. 2. B. & P. 61.

65. The holder of a bill of exchange may discharge the liability of the acceptor by parol; but for this purpose, the words must amount to an absolute renunciation of all claim upon him in respect of the bill. *Whitby v. Tricker*, 1 Camp. 35.

66. In an action for money had and received, by the holder of a bill of exchange, against a person who has received a sum of money from the acceptor to satisfy it, any defence may be set up which would be available, if the action had been brought against the acceptor himself. *Redshaw v. Jackson*, 1 Camp. 372.

67. But in an action by the second indorsee against the acceptor of a bill of exchange, if the person who indorsed it to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. *Chalmers v. Laniow*, 1 Camp. 383.

68. The holder of a bill of exchange, on its becoming due, allows the acceptor to renew it without consulting the indorser; but the indorser afterwards says to the acceptor, it was the best thing that could be done. This is not a recognition of the terms granted by

Payment and  
discharge of.



the holder to the acceptor, and the indorser is discharged. *Withall v. Masterman*, 2 Camp. 179.

69. If the indorser of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer and give him time to pay the residue, he thereby discharges the acceptor. *Lacton v. Peat*, 2 Camp. 185.

70. The drawer of an accommodation bill is not discharged by time being given to the acceptor. *Collott and others v. Haigh*, 3 Camp. 281.

71. The maker of a promissory note pays money into the hands of an agent to retire it, the agent tenders the money to the holder of the note on condition of having it delivered up; the note being mislaid the condition is not complied with, and the agent afterwards becomes bankrupt with the money in his hands. Held, that the maker was still responsible on the note; but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 3 Camp. 296.

72. Where, upon an accommodation bill becoming due, it was presented for payment to the acceptor, and he promised to pay it; held, that he was not discharged by time being afterwards given without his consent, to the drawer by the indorsee, who knew that it had been accepted for the drawer's accommodation. *Kerrison v. Cooke*, 3 Camp. 362.

73. An agreement between the holder and the acceptor of a bill (dishonoured for non-payment), that the acceptor shall pay to the holder the amount of the bill and no more, discharges the drawer, although his assignees (he being then a bankrupt) are parties to such agreement. *De la Torre v. Barclay and another*, 1 Starkie, 7.

74. Proof of a promissory note payable to *A. B.* generally, is *prima facie* evidence of a promise to *A. B.* the father, and not to *A. B.* the son, the names being the same; but *A.* the son, although styled, in the declaration, *A. B.* the younger, bringing the action and being in possession of the note, is entitled to recover upon it. *Sweeting v. Fowler and another*, 1 Starkie, 106.

75. An indorsee for value, transfers the bill, which is returned to him after it has become due; he may recover against the acceptor, although his indorsee, before the re-transfer, received satisfaction from the drawer. *Buzzard and another v. Flecknoe*, 1 Starkie, 333.

76. An acceptor of a bill of exchange cannot avail himself of a renunciation on the part of the holder of his claim upon him, unless it be express and founded upon some consideration. *Parker v. Leigh*, 2 Starkie, 228.

77. The drawer of a bill payable to his own order, after the bill becomes due, settles with the acceptor, and gives him a receipt in full of all demands. The drawer being afterwards in possession of the dishonoured bill, an indorsee from the drawer cannot maintain an action against the acceptor. *Thorogood v. Clarke*, 2 Starkie, 251.

78. On the day after the drawing of a bill of exchange payable at sight, the payee leaves it with the drawer for acceptance; a month afterwards the payee states that the drawer has refused to accept the bill, and resorts to other measures for obtaining payment of his debt from the drawer; in ten days after this, the drawer announces to the payee that he has destroyed the bill, conceiving it to be of no use. The drawer is not liable as the acceptor of the bill. (By the  
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three judges, Lord Ellenborough, C. J. dissentiente.) *Jones v. Ward*, 2 Starkie, 326.

79. *A.* accepts a bill for the accommodation of *B.*, which *B.* delivers to *C.* his creditor, to provide for a bill about to become due. *C.*, before *A.*'s bill becomes due, returns it to *B.* as useless, in order that it may be forwarded to *A.*, and abandons all claim upon the bill; *C.* cannot, by subsequently obtaining possession of the bill, acquire a right of action against *A.* In such case, *B.*, who has become bankrupt, is a competent witness for *A.*, after a general release by *A.*, although he has not been released by his assignees. *Cartwright and others v. Williams*, 2 Starkie, 340.

80. The legal situation of one who takes up a bill for the honour of a party thereto, is that of an indorsee, who therefore may sue all parties to the bill. *Mertens v. Winnington*, 1 Esp. N. P. C. 113.

Payment for  
the honour of  
a party.

81. It is no excuse for not giving notice to the indorsee of a bill of exchange, that the acceptor had no effects. *Wilkes v. Jacks*, Peake, 202.

Notice.

82. Where the payee and indorser of a note is entitled to call upon the maker, want of notice will discharge him; *secus*, where he is not entitled, as where the maker has paid him the amount as the consideration of his indorsement. *Corney v. Mendez da Costa*, 1 Esp. C. 302.

83. If the drawer of a bill had effects in the hands of the drawee, the want of notice of dishonour is not excused by proving a representation by the drawee to the drawer when the bill was drawn, that he should not be able to provide for it, and that the drawer understood himself should be forced so to do. *Staples v. Okines*, 1 Esp. C. 332.

84. Indorsee against indorser of a foreign bill. When the indorsement was made, the defendant was in Jamaica, where the bill was drawn, but his residence was at Stepney. The bill was presented for acceptance, dishonoured and protested; and then sent to the defendant's house for payment, with notice of non-acceptance. The defendant was not then in England, but the bill was shown to his wife, and the circumstances stated to her. It was urged, 1st, that notice should have been sent to Jamaica; 2d, that the demand on the wife was not sufficient; 3d, that a copy of the protest should have been sent with the notice. Lord Kenyon over-ruled all the objections, and the plaintiff had a verdict. *Cromwell v. Hynson*, 2 Esp. C. 511.

85. The circumstance that the payee had effects in the hands of the drawee, does not entitle the drawer, who had none to notice. *Walwyn v. St. Quintin*, 2 Esp. C. 515.; S. C. 1 B. & P. 652.

86. Securities left with the acceptor to raise money, but upon which none has been raised, are to be considered as effects in his hands. *Walwyn and others v. St. Quintin*, 2 Esp. C. 516.

87. A party to a dishonoured bill, saves laches by merely putting a letter, containing notice, into the post in due time. *Kerfh and others v. Weston and others*, 3 Esp. C. 54.; *Langdon v. Hulls*, 5 Esp. C. 157.

88. Though notice to the drawer may be dispensed with, where it is shown that he had no effects in the hands of the drawee, yet on any other ground evidence is inadmissible to show that he has not been prejudiced by the want of such notice. *Dennis v. Morrice*, 3 Esp. C. 158.

89. A bill of exchange, all the parties to which resided, in the  
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same town, became due on the fourth of the month, when it was presented for payment by the payee's bankers, who returned it to him dishonoured on the fifth. Held, that a letter sent by him to the drawer on the 6th was reasonable notice of the dishonour of the bill. *Scott v. Lifford*, 1 Camp. 246.

90. Where the parties to a bill of exchange reside in London or the vicinity, notice of the dishonour of the bill may be sent by the two-penny post. *Scott v. Lifford*, 1 Camp. 246.

91. Notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorized by him. *Stewart v. Kennet*, 2 Camp. 177.

92. In an action by the fourth, against the first indorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the two-penny post office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d. Held, that by this laches, the plaintiff had discharged all the prior indorsers, although, in the course of the 22d, notice of the dishonour was given both to the second indorsee and to the defendant. *Smith v. Mullett*, 2 Camp. 208.

93. It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shown that each indorsee gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorsees are discharged. *Marsh v. Maxwell*, 2 Camp. 210. n.

94. If the drawer or indorser of a bill of exchange receives due notice of its dishonour from any person (who is a party to it), he is directly liable upon it to a subsequent indorser from whom he had no notice of the dishonour. *Jameson v. Swinton*, 2 Camp. 373.

95. If a bill of exchange is presented for acceptance and not accepted, the drawer and indorsers are discharged by want of due notice of its being thus dishonoured; although the holder presents it for payment when due, and then gives them notice of its being dishonoured both for non-acceptance and non-payment. *Roscow v. Hardy*, 2 Camp. 458.

96. The holder of a bill of exchange is excused for not giving regular notice of its being dishonoured to an indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. *Bateman v. Joseph*, 2 Camp. 461.

97. The rule upon this subject in *De Havilland v. Bowerbank*, 1 Camp. 50. confirmed by the Court of K. B. *Bernales v. Fuller*, 2 Camp. 462.

98. If the drawer of a bill of exchange, when it is presented for acceptance, has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they without his privity, have appropriated the effects in their hands to the satisfaction of the debt; he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect, under these circumstances, that it would be accepted and paid. *Blackhan v. Doren*, 2 Camp. 503.

99. The holder of a bill of exchange is excused for not giving notice of its dishonour in the usual time, by the day on which he should regularly have given the notice being a public festival, during which he is strictly forbidden by his religion to attend to any secular affairs. *Lindo v. Unsworth*, 2 Camp. 602.

100. A notice of the dishonour of a bill of exchange sent by the two-penny post is sufficient, where the parties live within the limits of the two-penny post, whether near or at a distance from one another; but the letter conveying the notice should be proved to have been put into a receiving-house at such an hour, that, according to the course of the two-penny post, it would be delivered the day on which the party to whom it is addressed was entitled to receive notice of the dishonour of the bill. *Hilton v. Fairclough*, 2 Camp. 633.

101. A few days before a bill of exchange becomes due, the acceptor informs the drawer he will be unable to pay it, says the drawer must take it up, and gives him part of the amount to assist him in doing so. The drawer receives the money, and promises to take up the bill accordingly. Held, that in an action by the indorser against the drawer, the latter might nevertheless set up as a defence, that the bill was not duly presented for payment, and that he had not regular notice of its dishonour, but that the sum paid him by the acceptor was money had and received to the plaintiff's use. *Baker v. Birch*, 3 Camp. 107.

102. The drawer of a bill of exchange is entitled to due notice of its dishonour, if he had any effects in the hands of the drawee at any time between the drawing of the bill and its becoming due. *Hammond v. Dufrene*, 3 Camp. 145.

103. The drawer of two bills of exchange, before they became due, received notice that they were accidentally destroyed, and was called upon to give others in their stead, according to the stat. 9 and 10 W. 3. c. 17. When the bills were drawn, he had no effects in the hands of the acceptors, but before either was due, the acceptors were indebted to him to an amount less than one of the bills, and became bankrupt. Held, that he was nevertheless entitled to notice of the dishonour of both bills. *Thackray v. Blackett*, 3 Camp. 164.

104. Notice of the dishonour of a bill of exchange or promissory note may be given the same day it becomes due, as soon as the acceptor or maker has refused payment. *Burbridge v. Manners*, 3 Camp. 193.

105. If the drawer of a bill of exchange has reasonable ground to expect that it will be honoured on the strength of a consignment, he is entitled to notice of its dishonour, although no effects ever get into the hands of the drawee to pay it. *Rucker and another v. Hiller*, 3 Camp. 217.

106. To excuse the not giving of regular notice of the dishonour of a bill of exchange to the indorser, it is not enough to show that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262.

107. Where a bill is drawn upon funds which there is reasonable ground to expect will reach the hands of the drawee before it becomes due; although they do not, the drawer is entitled to notice of its dishonour. *Robins v. Gibson*, 3 Camp. 334.

108. Where the drawer of a foreign bill of exchange happens to be in England when it becomes due and is dishonoured, it is enough, for the purpose of charging him, to have the bill protested, and to give him notice of the fact of its dishonour, without communicating the protest to him, or sending a copy of it to the place where the bill was drawn. *Robins v. Gibson*, 3 Camp. 334.

109. In an action by the indorsee against the drawer of a bill of exchange, it is sufficient to prove that the defendant had notice of the

the dishonour of the bill from the acceptor. *Rosher and another v. Kieran*, 4 Camp. 87.

110. The drawer of a bill of exchange, a few days before it becomes due, states to the holder that he has no regular residence, and that he will call and see if the bill is paid by the acceptor. Held, that under these circumstances he was not entitled to notice of its dishonour. *Phipson v. Kneller*, 4 Camp. 285.; S. C. 1 Starkie, 116.

111. Notice to the drawer of a bill of exchange of its dishonour by any party to the bill, enures to the benefit of all. *Wilson v. Swabey*, 1 Starkie, 34.

112. The drawer of a bill of exchange, who, before the bill becomes due, says, "My residence is immaterial, I will inquire whether the bill is paid," dispenses with notice of the dishonour. *Phipson v. Kneller*, 1 Starkie, 116.

113. Evidence of a letter from the drawer and indorser of an accommodation bill, that the bill will be satisfied before the next term, supersedes the necessity of proving the dishonour of the bill and notice. *Wood v. Brown*, 1 Starkie, 217.

114. Notice of the dishonour of a bill of exchange given at the counting-house of a merchant or manufacturer, between the hours of six and seven in the evening, is not too late. *Bancroft v. Hall*, 1 Holt, 476.

115. The holder of a bill of exchange, which is returned dishonoured, is not bound to send notice to the drawer by the mail, or first conveyance that sets out from the place where such holder resides. It is sufficient, provided there be no essential delay, if he send notice by a private hand; and although such notice should thereby reach the drawer later in the day than if it had been sent by the mail, he will not on that account be discharged. *Bancroft v. Hall*, 1 Holt, 476.

116. The payee is entitled to notice of the dishonour of the note, although there were no consideration between him and the maker. *Free v. Hawkins*, 1 Holt, 550.

117. Ignorance of the place of residence of the drawer of a bill of exchange, is a sufficient answer to an objection arising out of the want of due notice of the dishonour of the bill, provided due diligence be used to discover his place of residence. *Browning v. Kinnear*, 1 Gow, p. 81.

Protest.

118. If the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reasonable grounds to expect that the bill would be honoured, a protest is unnecessary to charge the drawer. *Legge v. Thorpe*, 2 Camp. 310.

119. The protest on a foreign bill may be formally drawn up at any time, provided that, in the event of a suit, it is drawn up before the commencement of such suit. *Chaters v. Bell*, 4 Esp. C. 48.

Property in.

120. If a bill or note is deposited with a banker for a particular purpose, indorsed so as to give him the right to transfer it, and he pledge it, such pledging, although it may amount to a gross breach of trust, and defeat the purpose for which the deposit was made, will be binding on the person who made the deposit, as between him and an innocent holder. *Collins v. Martin and another*, 2 Esp. C. 520.; S. C. 1 B. & P. 648.

121. The payee of a bill or note not negotiable, is the proper party to sue thereon, though he has attempted to transfer it by indorsing it. *Drage v. Ibberson*, 2 Esp. C. 644.

122. A. being a creditor of B.'s, and having deeds in his possession

sion as a security for the debt, receives a bill indorsed by *B.* for the purpose of getting it discounted; he cannot disappropriate the bill, and maintain an action upon it against the acceptor. *Delauney v. Mitchell*, 1 Starkie, 439.

123. An action lies by the indorsee against the indorser upon a bill of exchange immediately on non-acceptance, though the time for which the bill was drawn has not elapsed. *Ballingalls and another v. Gloster*, 4 Esp. C. 481.; S. C. 3 East, 481. Suit.

124. Every indorsement essential to a transfer must be stated; unnecessary ones may be omitted. *Chaters v. Bell and others*, 4 Esp. C. 210. Pleadings.

125. Indorsements, and alterations in blank indorsements may be made at *nisi prius* to meet the justice of the case. *Rex v. Page*, 2 Esp. C. 650. n.

126. Bills of exchange upon Lisbon were indorsed by *A.* to *B.* in this country, and afterwards by *B.* to *C.*, a coal-merchant at Lisbon. When the bill became due, Lisbon was in the hands of the French, and they were dishonoured. *C.* re-drew upon *B.* in London, but *B.* did not honour the re-drafts. It did not appear clearly whether at that time, there was an established course of exchange between Lisbon and London. In an action by *B.* against *A.* upon the bills, the plaintiff's claim to re-exchange was disallowed by the jury, and the court afterwards refused to set aside the verdict upon that ground. *De Tasset v. Baring*, 2 Camp. 65. Damages.

127. The acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal sum, together with interest according to legal rate of interest, where the bill is payable. *Woolsey v. Crawford*, 2 Camp. 445.

128. If there is no consideration for part of the sum contained in a bill of exchange, the jury may apportion the damages, and need not find to the whole amount. *Barber v. Backhouse, Peake*, 61. Apportionment.

129. If a bill of exchange be given in consideration of the defendant entering into partnership with the plaintiff, and the treaty is afterwards broken off, the plaintiff is entitled to recover a verdict on the bill, to the amount of the damages he has sustained, and not to the full amount of the bill. *Ledger v. Ewer, Peake*, 216.

130. The indorsee of a bill, not an accommodation one, is entitled to recover against the drawer, or acceptor, the full value, though he gave less, and will hold the overplus in trust for the indorser; but where it is an accommodation bill, and he takes it, knowing that it is such, he can only recover what he gave. *Wiffen v. Roberts*, 1 Esp. C. 261. See 3 Taunt. 227.

131. It is no defence to an action on a bill of exchange, that the consideration for which it was given has partially failed. *Morgan v. Richardson*, 1 Camp. 40. n. *Fleming v. Simpson*, 1 Camp. 40. n.

132. In an action on a bill of exchange, accepted for the price of goods purchased for exportation, the defendant cannot give in evidence, that the goods were of a bad quality, and improperly packed, but is driven to his cross-action. *Tye v. Gwynne*, 2 Camp. 346.

133. A traveller received a bank note in a provincial town, which he cut in two, and sent the halves on different days by the post, addressed to his employers in London; one of these was stolen from the mail coach and they received the other. Held, that under these Division of

circumstances they could not maintain an action against the makers of the note on producing that half of it which reached them safely. *Mayor and others v. Johnson and another*, 3 Camp. 324.

134. A defendant who has given his promissory note, as the stipulated price of a picture, cannot give the inadequacy of the consideration in evidence, with a view to diminish the damages, but he may give it in evidence as a circumstance indicatory of fraud, in order to defeat the contract altogether. *Solomon v. Turner*, 1 Starkie, 51.

135. An acceptor of a bill of exchange, on an action brought against him by the payee, may show that he accepted it for value, as to part, and as an accommodation bill as to the rest. *Darnell v. Williams*, 2 Starkie, 166.

Accommodation.

136. Where a bill has been taken *bond fide* and upon good consideration, it is no defence to an action by the person taking it, that the bill was an accommodation one, and that known to him. *Smith v. Knox*, 3 Esp. C. 46.

137. Although the *bond fide* holder of a promissory note, made without consideration, himself gave a full consideration for it; yet if he took it after it was due from an indorser, who had given none, he cannot maintain an action upon it against the maker. *Tinson v. Francis*, 1 Camp. 19.

138. Although no consideration passes between the payee of a bill of exchange, it is not to be considered an accommodation bill as to the latter, if there was a valuable consideration as between the payee and the acceptor. *Scott v. Lifford*, 1 Camp. 246.

139. The drawer of a bill accepted for his accommodation, indorses it for value to his bankers, and before the bill becomes due, becomes bankrupt: the bankers, who knew that the bill was accepted for the accommodation of the drawee, cannot recover from the acceptor more than the amount of their balance as between them and the drawer at the time of his bankruptcy. *Jones and others v. Hibbert*, 2 Starkie, 304.

Fictitious payee.

140. A bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer, nor to bearer, but is completely void; unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor. *Bennet v. Farnell*, 1 Camp. 130. 180. c.

141. However, if money paid by the holder of such bill, as the consideration of its being indorsed to him, gets into the hands of the acceptor, it may be recovered back as money had and received. *Bennett v. Farnell*, 1 Camp. 130. 180. c.

When considered as payment.

142. Where a debtor gives a bill or note in payment, to which himself is not party, *laches* of the creditor, by which any party to the instrument who was liable to the debtor when owner thereof, is discharged, discharges the debtor. *Stedman v. Gooch*, 1 Esp. N. P. C. 3.

143. Where a creditor receives a note or bill, payable at a future day for his debt, he cannot sue the debtor until the day has passed, unless the instrument has been previously dishonoured by the person on whom it is drawn, or at whose house it is made payable. *Stedman v. Gooch*, 1 Esp. N. P. C. 5.

144. If a vendor receive in payment bills from a third person, under an order from the vendee, which are good when drawn, the debt is discharged, though afterwards, and before payment, the drawee becomes bankrupt. *Bolton v. Reichard*, 1 Esp. N. P. C. 106.

145. Where

145. Where bills are taken in payment, it will be presumed that the amount has been received, until the contrary is shown. *Hebden v. Hartsink* and another, 4 Esp. C. 46.

146. If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter; this does not discharge the debtor if the cheque is dishonoured; although the agent fails with a balance of his principal in his hands to a larger amount. *Everet v. Collins*, 2 Camp. 515.

147. The purchaser of goods, to be paid for by bill upon his agent, is not discharged by the seller taking a renewal of the bill, without giving him notice, if the agent had not funds in hand to pay the bill when it became due. *Clarke and another v. Noel*, 3 Camp. 411.

148. In an action of covenant upon a charter-party for freight, it is no defence that the plaintiff received part of the freight in money from the defendant's agent abroad, and the residue in a bill (without the privity of the defendants) drawn by the agent upon, and accepted by, certain merchants at London; and which bill was afterwards dishonoured upon the insolvency of the drawer and acceptors. But the defendants are still bound to pay the freight owing to the plaintiff; and such bill is not to be deemed payment, though defendants were not informed of the transaction until after the failure of the parties to it. *Marsh v. Pedder and others*, 1 Holt, 72.

149. The *bond fide* holder for value of a lost bill transferable by delivery, may sue thereon. *Sir John Lawson and others v. Weston and others*, 4 Esp. C. 56. Lost.

150. An action at law cannot be maintained against the acceptor of a bill of exchange which was lost, after being indorsed, although a bond of indemnity has been tendered to the defendant. *Pierson v. Hutchinson*, 2 Camp. 211.

151. If a bill, when lost, had only a special indorsement upon it, the indorsee may recover at law, without producing the bill. *Long v. Bailie*, 2. Camp. 214.

152. Although a bill of exchange cannot be re-issued after it has arrived at maturity and been once paid; yet, if it is paid, and afterwards indorsed before it becomes due, it is a valid security in the hands of a *bond fide* indorsee. *Burbridge v. Manners*, 3 Camp. 194. Re-issuing.

153. The statute 15 Geo. 2. c. 13. s. 5. does not preclude the members of a commercial firm, although exceeding six in number, from drawing bills at a shorter date than six months. *Wigan v. Fowler and others*, 1 Starkie, 459. Statute 15 G.2. c. 13.

## BILL OF LADING.

1. Any person taking goods under a bill of lading, makes himself liable to all its terms, and therefore to pay demurrage if that be one. *Dobbin v. Thornton*, 6 Esp. C. 16. Legal effect of.

2. *A.* has some rum in the West India docks, which he sells to *B.*; the rum is to be shipped by *A.* in a vessel chartered by *B.* Before the rum is delivered on board the vessel, *B.* gets a bill of lading from the captain; he then sells the rum in question to *C.*, who pays *B.* for it, upon an indorsement of the bill of lading. *A.* being unpaid, and suspecting the solvency of *B.*, takes some part of the rum forcibly from out of the vessel, and countermands the delivery of the rest.

In



In trover by *C.* against *A.* to recover the rum, held, that *C.* gained no good title under the bill of lading; such bill being fraudulent, inasmuch as *B.* procured it to be signed by the captain before the rum was delivered on board the ship. *Osey and another v. Gardner and another*, 1 Holt, 405.

Who entitled to.

3. When the master of a ship receives goods on board and gives a receipt for them, it is his duty not to deliver the bill of lading, except to the person who can give the receipt in exchange. *Craven and others v. Ryder*, 1 Holt, 100.

Construction.

4. Where a specified number of days for discharging a cargo are allowed by a bill of lading, working days, which are exclusive of Sundays and holidays at the custom house, not running days which include them, are meant. *Cochran v. Retberg and another*, 3 Esp. C. 121.

5. The clause in the margin of a bill of lading, is part of the special contract. *Cochran v. Retberg and another*, 3 Esp. C. 121.

6. Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped by order and on account of the consignee. The consignor cannot maintain any action against the ship-owner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship. *Brown v. Hodgson*, 2 Camp. 36.

7. If by the bill of lading of a cargo of brandy brought into the *London Docks*, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee is to discharge the ship in the usual and customary time for unloading such a cargo, which is the time within which the brandies can be unloaded in the docks into the bonded warehouses. Therefore, the consignee is not, under these circumstances, liable to make compensation to the owner of the ship, in the nature of a demurrage, for any delay occasioned by the crowded state of the *London Docks*, although the cargo might have been landed sooner, if the duties had been immediately paid. *Burmester v. Hodgson*, 2 Camp. 488.

8. A bill of lading signed by the captain, stating the ship to be bound to the port of destination with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy. *Sanderson and others v. Busher*, 4 Camp. 54. n. (a.)

9. Where a bill of lading of goods by a general ship deliverable to order, contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to pay demurrage; the indorsee of the bill of lading who takes out the goods is liable for demurrage from the expiration of the lay days calculated from the arrival of the ship, without receiving any notice of that event. *Harman v. Clarke and others*, 4 Camp. 159.

Indorsement.

10. If *A.* has an equitable title to goods on board a ship, and *B.*, knowing of such title, gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to *A.* *Dick v. Lumsden, Peake*, 189.

11. The *bond fide* indorsee of a bill of lading, for value, &c. without notice of the insolvency of the consignee, or of any other circumstance which in fairness should preclude him from taking the indorsement, has an absolute right to the goods, although he knew that the consignor had not been paid for them in cash. *Cuming v. Brown*, 1 Camp. 104. 180. c.

12. The

12. The indorsement of a bill of lading, without consideration, does not transfer any property in the goods; and therefore the mere indorsement of a bill of lading by the consignor to an agent, to authorize him to stop the goods *in transitu*, on account of his principal, will not enable such agent to maintain *assumpsit* or trover for the goods in his own name. *Waring v. Cox*, 1 Camp. 369.

13. By a bill of lading, goods are re-deliverable to *J. S.* if he should accept and pay a bill of exchange; if not, to the holder of the said bill of exchange. *J. S.* accepts the bill of exchange, and indorses the bill of lading for a valuable consideration, but does not pay the bill of exchange when due. Held, that upon its dishonour, the property of the goods vested in the holder of it, and that he might maintain trover for the goods against the indorsee of the bill of lading. *Barrow v. Coles*, 3 Camp. 92.

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### BRICKMAKER.

An action cannot be maintained by a brick-maker for the price of bricks which are under the standard dimensions required by statute 17 Geo. 3. c. 42. although when sold they were selected by the purchaser himself, and they were afterwards used by him in building a house, without any complaint being made as to their size or quality. *Law v. Hodgson*, 2 Camp. 147.

In relation to  
the st. 17 Geo. 3.  
c. 42.

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### BRIDGE.

A particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood; about 40 years ago the trustees of the turnpike road built on the same site a much wider bridge of brick, which has been constantly used ever since, by all carriages passing that way: held, that to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired, and still ought to repair the said bridge, was not supported by evidence of the above facts; and that the burden or repairing the new bridge must be borne by the county at large. *Rex v. Inhabitants of Surry*, 2 Camp. 455.

Repairs of.

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### BUST.

It is no offence under 38 Geo. 3. c. 71., passed for preventing the pirating of busts and other figures, made and published by statuary, to sell a pirated cast of a bust, if the piracy has any addition to or diminution from the original; and it appears to be no offence to make a pirated cast, as if it is a perfect *fac simile* of the original. *Gahagan v. Cooper*, 3 Camp. 111.

In relation to  
the st. 38 Geo. 3.  
c. 71.

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### CARRIER.

1. After a passenger has been allowed to seat himself, he may insist upon the chaise proceeding, unless he refuses to pay the fare on demand. *Massiter v. Cooper*, 4 Esp. C. 260.

Contract with.

- Rights of.** 2. A postmaster may require payment of the fare before allowing the chaise to proceed. *Massiter v. Cooper*, 4 Esp. C. 260.
- Fare.** 3. Where goods have neither been booked or warehoused, but required to be delivered at once from the waggon, the carrier cannot charge for booking or warehouse-room. *Lambert v. Robinson*, 1 Esp. N. P. C. 119.
- Liability of.** 4. The responsibility of water-carriers is the same with that of carriers by land. *The Proprietors of the Trent Navigation v. Wood*, 3 Esp. C. 127.
5. The reason of the rule that carriers are liable for damages to goods in their charge in all cases but two, does not hold with passengers; for injuries to these, therefore, they are not liable, unless occasioned through their own negligence. *Aston v. Heaven and another*, 2 Esp. C. 533.
6. The reason why a carrier is liable for the loss of or damage to goods in all cases but two, is, that otherwise there would be no security to the proprietor; the facilities to fraud on the part of the carrier being so great, and the practice so difficult to be detected. *Aston v. Heaven and another*, 2 Esp. C. 535.
7. The rule that carriers are answerable for the damage or loss of goods in their charge, holds without any other exception than those where the accident has been occasioned by the act of God, or the king's enemies; therefore in the case where clearly they are not in fault. *The Proprietors of the Trent Navigation v. Wood*, 3 Esp. C. 127.
8. The proprietor of a stage coach is not answerable for any damage that may happen to passengers from the coach being overturned by a mere accident. *Christie v. Griggs*, 2 Camp. 79.
9. A greyhound is delivered to a carrier, who gives a receipt for it; the greyhound being afterwards lost, the carrier cannot set up as a defence that the dog was not properly secured when delivered to him. *Stuart v. Crawley*, 2 Starkie, 323.
10. The proprietor of a stage-coach is answerable for the negligence of the driver, from the usual place of taking up passengers, not only till the coach arrives at its place of destination, but till the passengers are there safely set down. *Dudley v. Smith*, 1 Camp. 167.
11. The liability of the carman ceases, and that of the warehouseman begins, on applying the crane to the goods; whatever is afterwards done by the carman is done as the agent of the warehouseman. *Thomas and another v. Day*, 4 Esp. C. 262.
- Notice by.** 12. A common carrier cannot, by notice, exonerate himself from liability for losses for which by law he is responsible. *Hide v. The Trent and Mersey Navigation Company*, 1 Esp. N. P. C. 36.
13. A carrier may not only limit, he may exclude all responsibility, by notice. *Maving v. Todd and others*, 1 Starkie, 72.
14. A carrier who restricts his liability, is, notwithstanding, answerable in cases of negligence, the degree of which is a question of fact for the jury. *Smith v. Horne*, 1 Holt, 643.
15. The luggage of passengers is "goods," within the exemption claimed by the common notice of coach proprietors. *Clark v. Gray*, 4 Esp. C. 177.
16. A carrier places a board in his office, giving notice that he will not be answerable for jewels, however small their value, unless entered as such; but circulates hand-bills, stating generally that he will not be answerable for any article above the value of 5*l.* unless entered as such: he is answerable for the loss of jewels not entered as such, if under the value of 5*l.* *Cobden v. Bolton*, 2 Camp. 108.

17. It is not sufficient notice to limit the common-law responsibility of a carrier, for him to paste upon the door of his office, where goods are received and delivered, a bill blazoning the advantages of his conveyance, and stating in small characters at the bottom of it, that he will not be answerable for goods above the value of 5*l.*, unless entered as such and paid for accordingly. *Butler v. Heane*, 2 Camp. 415.

18. If a carrier receive goods at a distance from his office, to be discharged from his common-law liability, he must prove that the special terms on which he deals were communicated to the owners of the goods through some other medium than a notice stuck up in the office; and that, to be of any avail, must be in such large characters that a person delivering goods at the office cannot fail to read it without gross negligence. *Clayton v. Hunt*, 3 Camp. 27.

19. A notice by carriers, that they will not be answerable for any goods above the value of 5*l.*, unless the value be declared, and a premium paid above the common carriage, does not apply to goods which, from their bulk and appearance, must be known to exceed the specified value. *Beck and others v. Evans and another*, 3 Camp. 267.

20. Notwithstanding a notice by carriers that they will not be accountable for goods of a particular description above the value of 5*l.*, "unless specified and paid for as such when delivered:" held, that they are liable for damage done to an article of this description much above the value of 5*l.*, although *not paid for as such when delivered*, their book-keeper having been then informed of its value, and desired to charge what he pleased, which should be paid, provided it was taken care of. *Wilson v. Freeman*, 3 Camp. 527.

21. The usual notice given by carriers exempts them from their liability for the loss of goods above the value of 5*l.*, unless the appearance of the goods necessarily indicates that they are above that value. *Down v. Fromont*, 4 Camp. 40.

22. Notice to the vendor of goods that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent. *Maving v. Todd and others*, 1 Starkie, 72.

23. A carrier who gives two notices limiting his responsibility is bound by that which is least beneficial to himself. *Munn v. Baker and another*, 2 Starkie, 255.

24. A carrier, in order to avail himself of a notice limiting his responsibility, must bring notice of his intention home to the mind of the party; a notice stuck up in the office is insufficient where the party cannot read. *Davis v. Willan and others*, 2 Starkie, 279.

25. Though a carrier may, by law, limit his responsibility, a notice of certain limitations on his general liability, suspended at the *termini* of his journey, will not attach upon the delivery of goods at intermediate places where no such notice is given. *Gouger v. Jolly*, 1 Holt, 317.

26. A notice by carriers that they will not be answerable for any goods above the value of 5*l.*, unless entered as such and paid for accordingly, applies to goods which, from their bulk, may be supposed to exceed the specified value. *Thorogood v. Marsh*, 1 Gow, 105.

27. A notice by carriers that they will not be accountable for the loss or damage of goods, unless the terms of the notice are complied with, protects them as well against a loss by robbery as against an accidental loss. *Covington v. Willan*, 1 Gow, 115.

28. The

Negligence.

28. The proprietors of a mail coach are answerable for any injury happening to a passenger through the negligence of their driver. *White v. Boulton*, Peake, 81.

29. A driver is not bound to keep on what is termed his proper side of the road, unless other vehicles are passing; therefore, if an accident happens when on the other side, it is not therefore the result of negligence. *Aston v. Heaven* and another, 2 Esp. C. 533.

30. The driver of a stage coach, before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby suffer, which they might have escaped by alighting. 1 Camp. 167.

31. If, through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce*, 1 Starkie, 493.

32. If, when danger occurs, the driver of a stage-coach does not take the safest course, the coach-owner is responsible for the mischief which ensues. *Jackson v. Tollett*, 2 Starkie, 37.

Collateral matters.

33. Where a person in the country gives an order to a tradesman in London, with whom he has been in the habit of dealing, to send him down more goods by a particular coach, and at the office of this coach there is a notice stuck up, intimating that the proprietors will not be answerable for goods above the value of 5*l.* unless insured, it is enough for the vendor to deliver the goods ordered at this office, although they be above the value of 5*l.*, without insuring them, unless he has insured for the purchaser in former instances. *Cothay v. Tutt*, 3 Camp. 129.

Suit.

34. If the consignor of goods deliver them to a particular carrier by order of a consignee, and they are afterwards lost, the consignee must sue the carrier, notwithstanding the consignor paid the booking. *Dawes v. Peck*, 3 Esp. C. 12.; 8 T. R. 330.

35. A parcel delivered to the driver of a stage-coach to be carried is lost; the master and not the servant is responsible. *Williams v. Cranston*, 2 Starkie, 82.

## CHANCERY.

Issue.

Master's report.

1. The plaintiff may be nonsuited in an issue out of chancery, as well as in other cases. *Barnes v. Headley*, 1 Camp. 164.

Costs.

2. The report of a master in chancery, deciding against a claim, does not preclude the claimant from suing at law. *Le Sage v. Coussmaker* and others, 1 Esp. N. P. C. 187.

3. The court of Chancery will make one who, by a formal objection, defeats an action brought under its order, pay the costs. *Wray v. Barwis*, Peake, 69.

4. Costs paid to a defendant in equity, ought to be allowed to the plaintiff in his costs at law. *Comme semble*, *Grant v. Jackson*, Peake, 204.

## CHARTER-PARTY.

1. A provision in a charter-party for demurrage at specified ports, Construction. cannot by construction be extended to other ports. *Marshall v. De la Torre*, 1 Esp. C. 367.

2. By a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to a considerable expence, in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight, held, that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action, or to diminish the damages. *Bournman v. Tooke*, 1 Camp. 377.

3. If, by reason of the crowded state of the London Docks, a ship is detained there before she can be unloaded, a longer time than is allowed for that purpose by the terms of the charter-party, the freighter is liable for this detention to the owner of the ship. *Randall v. Lynch*, 2 Camp. 352.

4. If by a charter-party leave is given to detain the ship a certain number of days for the purpose of discharging her cargo, this amounts to a covenant on the part of the freighter, that he will not detain her longer. *Randall v. Lynch*, 2 Camp. 356.

5. Where the charterer of a ship to *Jamaica* and back covenanted to load her there with a complete cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt., and his agent at *Jamaica* tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10s. per cwt., which the captain refused to do: held, that the charterer was liable for dead freight. *Hyde v. Willis*, 3 Camp. 202.

6. Where a ship was freighted to go in ballast to *Jamaica*, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the *July* convoy, provided she arrived out and was ready by the 25th *June*: held, that as she did not arrive out till after the 25th *June*, the freighter was entirely discharged from his contract to furnish a cargo. *Shadforth v. Higgin*, 3 Camp. 385.

7. Where the charterer of a ship for a voyage to *Tobago* and back covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the *West Indies* on the 1st of *August*: held, that he was liable for not having loaded and dispatched her by the 22d of *July*, the day the *West India* convoy passed the island of *Tobago*, although he offered to load her with a complete cargo if she would stop a few days longer. *Thompson v. Inglis* and others, 3 Camp. 428.

8. A ship was described in a memorandum for charter as "the *Swedish* ship or vessel called the *Maria*." In fact, she was *British* built and had a *British* register, but she had a complete set of *Swedish* papers and a treasury licence to sail as a *Swedish* ship, which particulars were known to the freighter: held, that in an action against him for not loading and dispatching the ship according to the

the memorandum for charter, he could not set up as a defence that she was in point of fact a *British* and not a *Swedish* ship. *Reusse v. Meyers*, 3 Camp. 475.

9. Where by a charter-party the freighter covenanted to provide for the ship a full and complete cargo consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid: held, that having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done. *Moorson v. Page*, 4 Camp. 103.

10. Under a covenant in a charter-party to pay freight on skins by the pound, net weight, at the king's beam, freight is due on the outside skins in which the packages are contained. *Moorson v. Page*, 4 Camp. 103.

11. Where there is a charter-party covenanting for payment of freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fail with the amount of the freight in his hands; unless the master had the offer of a cash payment, and preferred the bill for his own convenience. *Marsh v. Pedder and others*, 4 Camp. 257.; S. C. 1 Holt, 72.

12. Where there is a stipulation in a charter-party that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay; but after her loading is completed, he is not liable for any delay that may arise in dispatching her, occasioned by the accidental impossibility of obtaining her clearances. *Barrett v. Dutton and another*, 4 Camp. 333.

13. Where by a charter-party of affreightment the owner of the ship covenants that she shall be furnished *with every thing needful and necessary for the voyage*, he is bound to furnish her not only with all documents required by the law of this country, but such as are required on her immediate admission into the foreign port mentioned in the charter-party; therefore, where by such a charter-party a ship was let to freight for a voyage to *Sardinia* and back, held, that the owner was liable for not furnishing her with a bill of health, without which, by the law of *Sardinia*, she could not be admitted into port before performing quarantine. *Levy v. Costerton*, 4 Camp. 389.; S. C. 1 Starkie, 212.; S. C. 1 Holt, 167.

14. And is therefore bound to provide a bill of health, if it be essential to the performance of the voyage, within a reasonable time, within the intention of the parties. *Levy v. Costerton*, 1 Starkie, 212.

15. Under a covenant in a charter-party that the ship shall be provided with every thing needful and necessary for the voyage, the owner is bound to provide the proper documents as well as necessaries for the ship itself. *Levey v. Costerton*, 1 Starkie, 212.

16. In an action by the owner against the freighter of a chartered ship for not supplying a cargo according to the terms of the charter-party, the freighter cannot insist upon the precise burthen stated in the charter-party. *Thomas v. Clarke and Todd*, 2 Starkie, 452.

17. In

17. In an action of covenant on a charter-party, in which the defendant covenanted that the vessel should be sufficiently furnished with every thing necessary and needful for the voyage in question, which was to *Cagliari in Sardinia*: held, that it was her duty to have a bill of health on board; and the plaintiff having been put to great inconvenience and expence on account of the ship not being provided with such document, that the defendant was responsible for the loss occasioned thereby. *Levy v. Costerton*, 1 Holt, 167.

18. *A.* charters a vessel and covenants to supply a full and sufficient cargo of certain commodities (describing them) and, amongst others, of cotton; the freight of which was to be paid for at certain prices per lb. for round bales, and different prices for square or compressed bales. He furnishes a cargo of compressed bales of cotton, but neglects to have the cotton *re-compressed*, according to the usage of the trade and the custom of the country whence it was imported. In consequence of this omission the vessel has not a full and sufficient cargo, as estimated upon the bales if they had been *re-compressed*, though her cargo would have been full and sufficient if the cotton had been stowed *only* in a *compressed* state. Held, that *A.* was liable for dead freight, and that it was his duty to have furnished the cotton in *re-compressed* bales, notwithstanding the words of the charter party. *Benson v. Schneider and others*, 1 Holt, 416.

19. Where the ship owner's claim against the freighter is for damages for occasioning the seizure and detention of his ship from the cargo not having been properly documented, he cannot recover under a count in *assumpsit* for demurrage. *Harrison v. Wilson*, 2 Esp. C. 709. Form of Action.

20. Even admitting that a simple agreement by the ship-owner to enlarge the time for discharging the cargo beyond that allowed by a charter-party under seal, is a defence to covenant thereon for demurrage, it must be specially pleaded. *Ratcliff v. Pemberton*, 1 Esp. N. P. C. 35. Pleadings.

### CLERGY.

Where an incumbent is prevented residing at his living by the unhealthiness of the place, he is not liable to the penalties for non-residence. *Scammell v. Willett*, 3 Esp. C. 29. Non-residence.

### COMPOSITION.

1. A clause in a composition deed, that unless certain creditors sign it shall be void, is satisfied by their accepting the composition on security for it without actual signature. *Jolly and another v. Wallis*, 3 Esp. C. 228. Construction.

2. If a creditor look over a deed of composition proposed by his debtor, and send a letter to the debtor's attorney expressing his approbation of it, and other creditors afterwards execute the deed, he cannot afterwards refuse to execute and maintain an action. *Butler v. Rhodes, Peake*, 238. Assent to.

3. A creditor at whose instance the debtor has assigned his estate in trust for all his creditors, is thereby estopped from suing for his demand, though he refuses to come in under the deed. *Butler v. Rhodes*, 1 Esp. C. 236.



4. Where a man's creditors agree to take a composition on their respective debts, to be secured partly by the acceptances of a third person, and partly by his own notes, and to execute a composition deed containing a clause of release, he cannot be sued for the original debt due to a creditor who had promised to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refused to execute the composition deed after it had been executed by all the other creditors. *Bradley v. Gregory*, 2 Camp. 383.

Its effect.

5. A creditor by coming in with others under a deed of composition, relinquishes his whole demand against the debtor, though he prove a part only, and though the residue, being bills of exchange, were not then due, unless it was understood and agreed by the others that he should retain his claim for the residue. *Holmer v. Viner*, 1 Esp. N. P. C. 132.

6. If under an agreement between a debtor and his creditor to take half the demand in ready money, and a note for the other half payable at a future day, the creditor receives the money; he cannot sue the debtor for nonpayment of the other half before the time has expired, notwithstanding he refuses to give the note or gives an unstamped one, without first returning the money, and thereby rescinding the agreement *in toto*. *Swears v. Wells*, 1 Esp. C. 317.

7. A man's creditors enter into an agreement with him not under seal, to take 20*l.* per cent. upon their respective debts, in satisfaction of the whole; 10*l.* per cent. to be paid within a month, and the remaining 10*l.* per cent. to be secured by the acceptances of a third person at five and nine months. The composition is paid pursuant to the agreement. A creditor having received the composition, cannot afterwards bring an action for the residue of his debt. *Steinman v. Magnus*, 2 Camp. 124.

8. A man being embarrassed in his circumstances, all his creditors sign an agreement to give him time for the payment of their respective demands by instalments, and to take his promissory notes for the amount. This agreement is binding upon each of them, the signing of the others being a sufficient consideration, and they cannot sue for their original cause of action, without proving that the agreement has been broken on the part of the debtor. *Boothbey v. Sowden*, 3 Camp. 175.

9. The creditors of *A.*, in consideration of his assignment of all his stock in trade and book debts to a trustee for the benefit of his creditors, agree to execute releases as soon as the property shall realize the sum of 238*l.* This agreement on the part of the creditors does not suspend their right of action against *A.*, although they have taken security from a purchaser of the stock in trade for the sum of 223*l.* *Wiglesworth v. White and wife*, 1 Starkie, 218.

10. *A.* a creditor of *B.* executes a composition deed without specifying the amount of his demand, he thereby binds himself to the extent of his claim, although the terms of the deed are to take the composition for the sums set opposite to the respective names of the creditors who execute the deed. *Hacchy v. Wall*, 2 Starkie, 195.

11. If one creditor by undertaking to discharge his debtor, induce another creditor to discharge that debtor on receiving a composition for his debt, he cannot afterwards recover from that debtor. *Wood v. Roberts*, 2 Starkie 417.

Collateral engagements.

12. By a deed of composition between a trader and his creditors, it was agreed, that the trader should give them his bills accepted by a friend for

for 10s. in the pound, payable in certain portions at fixed periods, and his own promissory notes for the remaining 5s., and that the creditors should be at liberty to take his own notes only for their full demands if they pleased. One of the creditors who signed the deed took bills from the debtor accepted by his friend for the whole 15s. in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition. Held, that the transaction was valid, since the creditor did not receive by it more than the others. *Feize v. Randall*, 1 Esp. C. 224; S. C. 6 T. R. 146.

13. The plaintiff having guaranteed the responsibility of the defendant to A., the latter refuses to join in a deed of composition releasing the defendant, till the plaintiff has undertaken to pay him the full amount of his debt; the plaintiff having paid to A. the difference between the composition and his debt, draws a bill on the defendant, (which the latter accepts) in order to reimburse himself. The plaintiff cannot recover on this bill against the defendant. *Bryant v. Christie*, 1 Starkie, 329.

### CONFIRMATION.

If a tenant for life under a limited power of leasing grant a lease exceeding his power, the lease is void as against the remainder man, and not capable of confirmation by him. But if the remainder man accept rent, as rent, after the death of the tenant for life, it is an admission that the party is his tenant, and entitles him to notice to quit. *Doe, ex dem. Martin and another v. Watts*, 2 Esp. C. 501; S. C. 7 T. R. 83.

Of lease by tenant for life.

### CONSTABLE.

1. Since the office of constable may be served by deputy, an officer whose duty requires his personal attendance is not exempt. *Rex v. Wood*, 1 Esp. C. 359. Exemption from office.

2. A member of the Barbers' Company in the city of London is not exempted from serving the office of constable. *Rex v. Chappell* 3 Camp. 91.

3. A constable of his own authority may arrest one who in his view has committed a breach of the peace. But if an offence has been committed out of his sight, he cannot arrest unless it amounts to a felony, or a felony appears from the statement likely to ensue. *Coupy v. Henley and others*, 2 Esp. C. 540. Arrest by.

4. A constable is justified in committing on a charge of felony, though it prove unfounded. *White v. Taylor and another*, 4 Esp. C. 80.

5. A peace-officer may justify taking a person into custody charged with a felony, although no felony was committed. *Hobbs v. Branscomb and others*, 3 Campbell, 420. *vide etiam* *McClougham v. Clayton and another*, 1 Holt, 478. and the note annexed to that case.

6. *Semble*, A constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods on the mere assertion of the principal felons. *Isaacs v. Brand and others*, 2 Starkie, 167.

7. Constables and surveyors appointed under the Shadwell Police Act, 39 and 40 Geo. 3. c. 87. cannot, without a special warrant, take a party into custody. *Rex v. Lawson and others*, 3 Esp. C. 262.

- Bail by.** 8. A constable has no authority to bail an offender whom he has taken up. *Hardy v. Murphy* and another, 1 Esp. C. 295.
- Extent of his responsibility.** 9. Officers having seized goods under a magistrate's warrant are not liable for any inquiry to them after they have been delivered into the offices. *Price v. Messenger* and another, 3 Esp. C. 97.
- Assistant to.** 10. If *A.* obtains a warrant against *B.* directed to *C.* and *D.* as constables, and voluntarily assists them in executing it, to trespass and false imprisonment brought by *B.* against the three others, *A.* as well as *C.* and *D.* may plead the general issue, and give the special matter in evidence. *Nathan v. Cohen* and others, 3 Camp. 257.
- Suit.** 11. Held, that a constable is not entitled to notice of action under statute 24 Geo. 2. c. 44. s. 8. where he had no authority to interfere, but only where being authorized to act he executes the authority in an improper manner or exceeds it. *Alcock v. Andrews*, 2 Esp. C. 542. n.
12. If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant according to statute, 24 Geo. 2. c. 44. *Price v. Messenger* and another, 3 Esp. C. 96; S.C. 2 B. & P. 158.
13. A constable is protected by the statute 24 Geo. 2. c. 44. only when acting under the warrant of a magistrate. *Postlethwaite v. Gibson* and another, 3 Esp. C. 226.
14. A constable who imprisons a person on suspicion of felony without any reasonable grounds, of his own authority, without any warrant or charge from any other person, is within the statute 21 J. 1. c. 12. which requires the *venue* to be laid in the proper county. If a private person act in such case in aid of the constable, and upon his command, he also is within the statute, otherwise, if he be the prime mover and act as a principal in the transaction. *Staigh v. Gee*, 2 Starkie, 445.
15. In an action of trespass for false imprisonment, a constable may justify under the general issue, though he acted without a warrant, provided there were a reasonable charge of felony made; although he afterwards discharges the prisoner without taking him before a magistrate; and although it should turn out, in fact, that no felony was committed. But a private individual who makes the charge and puts the constable in motion, cannot justify under the general issue: he must plead the special circumstances, by way of justification, in order that it may be seen whether his suspicions were reasonable. *McCloughan v. Clayton* and another, 1 Holt, 478.
16. A goaler receiving and detaining a person under the warrant of a magistrate, is entitled to the protection of the 24 Geo. 2. c. 44.; and therefore on producing and proving the warrant under which the detention was made, it is immaterial whether or not the magistrate had jurisdiction to grant it. *Butt v. Newman*. 1 Gow, p. 97.

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## CONTRACT.

- Express.** 1. A special agreement, so long as it continues, excludes the right which the law would otherwise have created. *Parker* and another v. *Harcourt*, 5 Esp. C. 249.
- Implied.** 2. Declaration on a promise by the defendant to pay over to the plaintiff the amount of a bill of exchange delivered to him by the plaintiff to get discounted. The defendant having paid the bill in discharge of a debt of his own, is liable to the plaintiff as if he had discounted the bill. *Oughton v. West*, 2 Starkie, 321.

3. *A.* a maltster sends malt to *B.* the purchaser. which is conveyed in *C.*'s barge, and is delivered to *B.* in sacks belonging to *C.*, *B.* requests that the sacks may be left for his own convenience, and engages to return them within a reasonable time. The contract to return the sacks is between *B.* and *C.* *Terry v. Barker*, 2 Starkie, 172. Parties to.

4. If *A.* agrees to accept a bill for goods to be shipped by *B.*, to be drawn at the expiration of a specified time from the date of the invoice of the goods, at such a date, notice of the shipment need not be given to *A.*, since he has not stipulated for it. *Oxley v. Young* and another, 1 Esp. C. 424. Construction.

5. Where the meaning of a term in a mercantile contract is doubtful, it may be explained by the usage of trade. *Cochran v. Retberg* and another, 3 Esp. C. 121. Vide in tit. Action.

6. An answer to a demand of a debt barred by the statute of limitations, "I think I am bound in honour to pay the money, and shall do it when I am able;" is only a conditional promise, and therefore throws upon the creditor the *onus* of proving the debtor's ability; which proof must go to the time of action brought. *Davies v. Smith*, 4 Esp. C. 36.

7. An obligation by an heir at law to make a voluntary conveyance of lands descended, does not oblige him to covenant against the incumbrances of his ancestors. *Chapman v. Ladbroke*, 4 Esp. C. 149.

8. If a person orders several articles from a tradesman, at the same time, though at distinct prices, he may consider the whole as forming one order, and he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accept of any one article, he is precluded from saying that the order was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract. *Champion v. Short*, 1 Camp. 53.

9. Where the plaintiff subscribed articles of agreement under seal, between the captain of a ship and the mariners, whereby, in consideration of their serving faithfully in a fishing voyage to the South Seas and back again, they were each to receive a certain share of the nett proceeds of the cargo brought home, and the defendant, as owner of the ship, appointed agent to dispose of the cargo for the benefit of all concerned; held, that money had and received would lie against the defendant to recover the plaintiff's share of the nett proceeds on proof that the defendant had disposed of the cargo, and that the price of it had come to his hands; without evidence of an acknowledgment that the plaintiff had done his duty during the voyage, and was entitled to his stipulated share of the proceeds. *Evans v. Bennett*, 1 Camp. 300.

10. *A.* sold to *B.* all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons by *C.* the agent of the concern. *C.* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but afterwards of 300 tons, on account of other persons. Held, that the contract must be confined to such hemp as *C.* should ship as agent to *A.*, and that *A.* was not answerable to *B.* for more than the 71 tons. *Hayward v. Scougall*, 2 Camp. 56.

11. An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers. *Holcome v. Hewson*, 2 Camp. 391.

12. *A.* in London engages not to open a shop for business within one mile of *B.*'s shop; estimating the distance, the shortest way of access by the footpath is to be taken. *Woods v. Dennet*, 2 Starkie, 89.

13. The payee of a bill of exchange accepted as a security for *A.* engages to renew it within three months more, if *A.* be not returned before the bill become due. If the acceptor after the expiration of that time make no application for a renewal of the bill, the payee may bring his action before the expiration of three months more. *Gibbon and others v. Scott*, 2 Starkie, 286.

Entirely of.

14. A surgeon and apothecary having agreed with a father to take his son as an apprentice in consideration of a premium; after the son has served for seven months the agreement is broken off on account of the refusal of the former to pay the expence of the stamp for the indentures. The master cannot recover damages for breach of the agreement, nor can he recover as for the board and lodging of the son. *Keene v. Parsons*, 2 Starkie, 506.

Deviation from.

15. Where a builder agrees to erect any building for a particular sum of money, and additions are made, the builder is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the excess only. *Pepper v. Burland*, Peake 103.

16. If an article is contracted for, and the workmanship prove inferior to the specimen, the vendee has the choice of returning it; but unless he rescinds the contract *in toto* he must pay the price stipulated for, without any abatement. *Grimaldi v. White*, 4 Esp. C. 95.

Suit.

17. Where a party undertakes for what he is unable to perform, the other side, on discovering the truth, may rescind the contract and sue for the consideration paid *eo nomine*, without declaring on the special circumstances. *Farrer v. Nightingal*, 2 Esp. C. 639.

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## CONVICTION.

Form of.

Where a statute prescribes a particular form of conviction, a conviction in any other form is void, and so much so, that those who act under it are trespassers, though it has not been reversed or quashed. *Goss v. Jackson and another*, 3 Esp. C. 198. But see 7 T. R. 633 n.; 12 East, 67; 16 East, 13.

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## COPYHOLD.

Recovery.

1. An attorney may be appointed, for the purpose of suffering a recovery of copyhold lands, as of common right, unless there be an express custom to the contrary. *Wymer v. Page*, 1 Starkie, 9.

Fees on admission.

2. In an action by the steward of a manor, for a particular rate of fees, claimed to be due to him from a tenant, on his admission to six several copyhold estates, if he fail to establish a custom for his charges, he may, notwithstanding, resort to a *quantum meruit*. — Held afterward by the court, that where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, without proving a custom, to full fees on each admission, separately; but he may stand on his *quantum meruit*. *Everest v. Glyn*, 1 Holt, 1.

## COPYRIGHT.

1. The editor of a work has a copyright in any additions which he may make to it. *Cary v. Longman*, 3 Esp. C. 273. Subjects of.
2. The first publisher of a work, though surreptitiously obtained, may sue for pirating it. *Cary v. Kearsley*, 4 Esp. C. 169.
3. The proprietor of a print may maintain an action against any person who pirates it, although his name is not inscribed on it pursuant to the directions of statute 8 Geo. 2. c. 13. s. 1. *Roworth v. Wilkes*, 1 Camp. 94. When substituting.
4. A musical composition, published on a single sheet of paper, is privileged as a book within 8 Anne, c. 19. s. 1. *Clementi v. Golding*, 2 Camp. 25.
5. A song composed to be sung at the Italian opera, remains the property of the composer. *Storace v. Longman*, 2 Camp. 27. n.
6. The legal interest or ownership in copy-right can only be transferred by writing. The action therefore for pirating a song after a verbal assignment, must be brought by the assignor not the assignee. The statute 8 Anne, c. 19. requires that the consent of the proprietor to authorize the printing or re-printing of any book, be in writing, from which the above rule is inferred as an implied enactment; if the licence which is the lesser thing, must be in writing, a portion of the assignment, which is the greater thing, must be. *Power v. Walker*, 3 M. and S. 7 S. C. 4 Camp. 8. Transfer of.
7. Where two works upon the same subject are, and from the nature of that subject must be precisely similar, it is not of itself evidence that the one was copied from the other, that the same errors (not of the press, but in the names, &c.) which were inserted in the latter, are to be found in the former. *Cary v. Kearsley*, 4 Esp. C. 168. Pirating.
8. An author may lawfully embody with his work, extracts from another, if done *bonâ fide* to complete his own, and not with the view of publishing the original. *Cary v. Kearsley*, 4 Esp. C. 169.
9. If an article, in a general compilation of literature and science, copies so much of a book, the copy-right of which is vested in another person, as to serve as a substitute for it; though there may have been no intention to pirate it, or to injure its sale; this is a violation of literary property, for which an action will lie to recover damages. *Roworth v. Wilkes*, 1 Camp. 94.
10. Where an engraving has been made from a picture, it is not a piracy of the print for another artist to make another engraving from the original picture. *De Berenger v. Wheble*, 2 Starkie, 548.

## CORPORATION.

1. If an ejectment by a corporation against a tenant from year to year, a notice to quit given by a person acting as steward of the corporation, is sufficient, without evidence that he had an authority under seal from the corporation for this purpose. *Roe v. Pierce*, 2 Camp. 96. Ejectment by.
2. An action for use and occupation may be maintained by a corporation aggregate. *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466. Action by, for use and occupation.

## COSTS.

## COSTS.

What are, and when recoverable.

1. Where a plaintiff suing on an agreement unstamped, copies it on stamped paper and sends it to the defendant requiring him to execute it, which he refuses; whereupon the plaintiff is obliged to pay the penalty for stamping the original, it shall be allowed him if he succeeds, in the taxation of costs. *Bowen v. Pitman*, 2 Esp. C. 728.

2. In an action for malfeasance, whereby the plaintiff incurred costs in judicial proceedings, if there is an order of another court for the defendant to pay the costs of these proceedings to the plaintiff, he can neither recover, as special damage, the sum at which they are taxed, nor the extra costs as between himself and his attorney. *Hathaway v. Barrow*, 1 Camp. 151.

In trespass.

3. In trespass for entering a close, breaking up a saw pit, and carrying away and converting the materials, the proof was that the materials had been restored; the damages were under 40s., and *Eyre C.J.* held that the plaintiff was entitled to full costs, since the restoration of the property went only in mitigation; but *Buller J.* in bank held otherwise. *Richardson v. Tomlin*, 1 Esp. C. 255.

4. In trespass and false imprisonment against several, and one acquitted, a certificate was granted under 8 and 9 W. 3. c. 11. to deprive him of costs. *Aaron v. Alexander*, 3 Camp. 35.

5. Trespass, the breaking of a jar is sufficient to entitle the plaintiff to full costs, under a count alleging an *asportation and conversion*. *Gosson v. Graham*, 1 Starkie, 55.

In suit for mesne profits.

6. If the plaintiff in an action for *mesne profits* recover less than 40s., and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages; whether the suit is by the lessor or the nominal lessee. *Doe v. Davis*, 1 Esp. C. 357; *S.C.* 6 T. A. 593.

In relation to the Welsh act.

7. Under the Welsh judicature act, 13 Geo., the judge is bound to certify. *Cooper v. Davies*, 1 Esp. C. 463.

## COURT.

Superior.

1. The fourth section of statute 11 Geo. 2. c. 19. which, in the case of goods carried away to avoid payment of rent, gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 20*l.*, does not take away the jurisdiction of the king's superior courts. *Horsefall v. Davy*, 1 Holt, 147., *S.C.* 1 Starkie, 169.

2. The inquisition taken in the year 1730, as to the fees due to different officers, is conclusive evidence. *Green v. Hewett, Peake*, 184.

Of King's Bench.

3. The court of *K.B.* have no jurisdiction at common law over offences wholly committed out of England; *secus*, where partly arising therein. *Rex v. Munton*, 1 Esp. N.P. C. 62.

4. The under ushers and cryers of the court of *K.B.* are distinct officers from the chief usher and cryer, and not dependent on him. *Comme semble*, *Green v. Hewett, Peake*, 182.

Of Nisi Prius.

5. A judge at *Nisi Prius* has no equitable jurisdiction, and can only look to the strict legal rights of the parties upon the record. Therefore if an action for goods sold, the defendant proves a receipt in full,

full, signed by the plaintiff, evidence cannot be admitted by way of answer to this defence, that the plaintiff had assigned all his effects for the benefit of his creditors; that the action was brought by his trustees in his name; that no money passed when the receipt was given; and that the plaintiff on the record, and the defendant had colluded together to defeat the action;— although, upon an application to the court *in banco*, it might have interposed to prevent the defendant from availing himself of a receipt obtained under such circumstances. *Alner v. George*, 1 Camp. 392.

6. A judge sitting at *Nisi Prius* at Westminster, cannot make an order in a cause entered for trial in London. *Atkinson v. Dickinson*, 3 Camp. 41.

7. The court of *Nisi Prius* will not notice objections to an indictment upon the trial which fully appear on the record. *Rex v. Souter*, 2 Starkie, 423.

8. If a merchant abroad orders goods of a shop-keeper within the city of London, to be put on board a ship lying beyond the limits of the city, and the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the mayor's court, as a debt arising within the city. *Huxham v. Smith*, 2 Camp. 21. Mayor's court.

9. Occasionally underwriting a policy at Lloyd's coffee house, where the party has a seat, is not a seeking his livelihood within the city, so as to subject him to the jurisdiction of the court of conscience for London. *Miller v. Williams*, 5 Esp. C. 19. Court of conscience.

10. The payment of money into court, prevents the defendant depriving the plaintiff of his costs under the court of conscience act, &c. *Miller v. Williams*, 5 Esp. C. 22.

## COVENANT.

In covenant, a licence must be specially pleaded, and is inadmissible under the plea of *non est factum*. *Ratcliff v. Pemberton*, 1 Esp. N. P. C. 35. Pleadings.

## CROWN.

It is a part of the ancient prerogative of the crown, as incident to the duty of customs to appoint officers to gauge all gaugable articles imported into the kingdom, whether for sale or otherwise. *Mayor of London v. Long*, 1 Camp. 26. Prerogative of.

## DAMAGES.

1. In an action for negligence, whereby the plaintiff's wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death. *Baker v. Bolton*, 1 Camp. 493. Baron and fence.

2. In



Bill of Exchange.

2. In troyer for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. *Mercer v. Jones*, 3 Camp. 477.

Bond and Penalty.

3. The rule that in debt on bond, conditioned for the performance of covenants, &c., damages must be assessed under statute 8 and 9 W. 3., applies as well where the covenants are contained in a separate deed referred to in the condition, as where contained in the condition itself. *The corporation of Chelsea Waterworks v. Cowper*, 1 Esp. C. 275.

4. In debt on bond conditioned for the performance of covenants, if the condition is not set out in the pleadings, the plaintiff in executing a writ of enquiry under 8 and 9 W. 3. c. 11., must prove that the bond mentioned in the suggestion and produced to the jury, is that on which the action was brought. *Hodgkinson v. Marsden*, 2 Camp. 121.

5. *A.* binds himself under a penalty to indemnify *B.* against his obligation to *C.* if the money be not paid before a certain day; *B.* in an action on the bond for not indemnifying, is entitled to recover the amount of the penalty of the bond. *Wood v. Wade*, 2 Starkie, 167.

6. Upon *non est factum* pleaded to a bond for the performance of certain conditions, breaches of which are assigned in the declaration, the jury to try the issue may assess the damages under the common *venire*. *Parkins and another v. Hawkshaw*, 2 Starkie, 381.

7. In an action on an agreement to serve the plaintiff under a penalty, the jury cannot exceed the penalty in damages, and within it, are only to give the plaintiff a compensation for the loss he proves he has sustained. *Wilbear v. Ashton*, 1 Camp. 78.

Carrier.

8. Where goods destined to a foreign port are captured in consequence of a deviation, the owners of the goods are entitled to recover from the owners of the ship only the prime cost of the goods, together with the shipping charges, and not the expence of effecting a policy of insurance upon them, without direct proof that the goods at the time of the loss were enhanced in value beyond their first price, to the amount sought to be recovered for insurance. *Parker and others, v. James and another*, 4 Camp. 112.

Charter party.

9. If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent to the owner, or the freighter, to show that this would be more or less than a fair compensation for the detention. *Moorsom v. Bell*, 2 Camp. 616.

10. In an action for not supplying a cargo under a charter party, according to the terms of which different articles of freight are to be paid for at different rates, by weight, and the freighter is at liberty to supply which articles he pleases, an average value of freight calculated upon the various rates of freight, in the proportion of different articles usually carried on such a voyage is the proper measure of damages. *Thomas v. Clarke and another*, 2 Starkie, 450.

Customs.

11. In an action against officers for seizing goods, evidence of special damage is inadmissible, if the plaintiff has a suit depending against the informer. *Price v. Messenger and another*, 3 Esp. C. 99.

Hunting.

12. In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by the defendant himself, but also for that done by the concourse of people who accompanied him. *Hume v. Oldacre*, 1 Starkie, 351.

13. A tenant covenanted to pull down a building on the premises, that the lessor might make a way in that direction: held, that as the use of the way was not reserved to the lessor, he could only recover nominal damages for a breach of the covenant. *Good v. Hill*, 2 Esp. C. 690. Landlord and tenant.

14. In an action for throwing poisoned barley upon the plaintiff's premises, in order to poison his poultry, the jury are not confined in their verdict to the actual damages sustained, but may consider the malicious intention of the defendant. *Sears v. Lyon*, 2 Starkie, 317. Malice.

15. In an action for maliciously holding the plaintiff to bail, he is entitled in the calculation of damages to recover, not merely the taxed costs, but the costs as between attorney and client. *Sandback v. Thomas*, 1 Starkie, 306. Malicious arrest.

16. In an action for wounding the plaintiff's son, *per quod servitium amisit*, the plaintiff is entitled to recover the amount of the surgeon's bill, although it has not been paid, but he cannot recover physicians' fees which have not been paid. *Dixon v. Bell*, 1 Starkie, 287. Master and servant.

17. Where freehold premises are upon lease, and there are several interests, viz. tenant for life, remainder in tail, and the reversion in fee; and there is a breach of covenant which gives the tenant for life a right of action, he can only recover such damages as are commensurate with the injury done to his life estate, and not the damages which may be sustained by the reversioner. *Evelyn v. Raddish*, 1 Holt, 543. Reversion.

18. The jury cannot give separate damages against several defendants in trespass, though the conduct of some may be aggravated beyond that of the others. *Brown v. Allen and another*, 4 Esp. C. 158. Several defendants.

19. In an action for not replacing stock on a particular day, the plaintiff may estimate his damages according to the price of stock at the time of the trial. *Dounes v. Back*, 1 Starkie, 318. Stock.

20. In an action to recover back a deposit paid on the purchase of an estate, the vendor not being able to make a good title, if the plaintiff declare specially, and allege as special damage, that he has lost the use of his money; on making out his case, he will be entitled to interest on the deposit money from the time the purchase should have been completed. *De Bernales v. Wood*, 3 Camp. 258. Vendor and purchaser.

21. In an action of assumpsit, it is alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings, *per quod*, they became and were of no use or value to the plaintiff. The plaintiff is entitled, without any further allegation of special damage, to recover as much as the goods would have been worth to him, had the contract been faithfully performed by the defendant. *Bridge v. Wain*, 1 Starkie, 504. Goods sold.

22. Where the plaintiff declares on a *quantum meruit* for work and labor done, and materials found, the defendant may reduce the damages by showing that the work was improperly done; and may entitle himself to a verdict, by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed. *Farnsworth v. Garrard*, 1 Camp. 38. Work and labour.

## DEBT.

In an action of debt on bond, coverture is a good defence under a general plea of *non est factum*. *Lambert v. Atkins*, 2 Camp. 272. Pleading.

DEBTOR

## DEBTOR AND CREDITOR.

## Contract.

1. Upon an agreement between two traders to supply each other, on the footing of goods for goods, after a balance struck between them, such balance is to be paid in money. *Ingram v. Shirley and another*, 1 Starkie, 185.

2. Upon the dissolution of partnership between the plaintiffs *A.* and *B.*, it is agreed that the joint debts shall be received by *C.*, an agent appointed by both, for the discharge of their joint debts. The defendant accedes to this arrangement, but afterwards *A.* countermands the authority to *C.*, and demands the debt from the defendant which he pays *A.*, and *B.* cannot afterwards maintain an action for the debt. *Bristow and Porter v. Taylor*, 2 Starkie, 50.

## Payment.

3. If a debtor is directed by his creditor to remit money by the post, and it is lost, the creditor must bear the loss. *Warwicke v. Noakes, Peake*, 67.

## DECEIT.

## Misrepresentation of another's circumstances.

1. To support an action for a false assertion as to the circumstances of a third person, it must appear that the defendant intended to impose on the plaintiff, and that the plaintiff relied on his information. *Scott v. Lara, Peake*, 226.

2. One charged with having fraudulently misrepresented the credit of another, may explain away the circumstance of having himself previously arrested him. *Wood v. Wain*, 1 Esp. C. 442.

3. By a recovery of satisfaction against one for fraudulently misrepresenting another's circumstances, the latter is not discharged from the credit given. *Burton v. Lloyd*, 3 Esp. C. 207.

4. If a man, by a false representation, induces another to supply goods on the credit of a third person, and enters into a collateral undertaking, not in writing, to pay for them, he is not liable as for goods sold, but must be sued in an action of deceit. *Thompson v. Bond*, 1 Camp. 4.

5. If *A.* enquires generally of *B.* concerning the circumstances of *C.*, *A.* cannot maintain an action against *B.* for a deceitful representation upon this subject, if *C.* pays *A.* for the goods which it was in contemplation to sell when the representation was made, although *C.* becomes insolvent, and is indebted to *A.* for other goods subsequently sold. *Aliter*, if *A.* had enquired of *B.* whether *C.* was worthy to be trusted as a general customer, or if there had been any conspiracy between *B.* and *C.* to cheat *A.* by paying for the first parcel of goods. *De Graves v. Smith*, 2 Camp. 533.

## Warranty.

6. The purchaser of a warranted, but worthless watch, is entitled to maintain an action for deceit, although it is stipulated, that if he dislikes the watch, the vender shall exchange it for one of equal value. *Wallace v. Jarman*, 2 Starkie, 162.

## DEED.

## What is.

1. Though the signatures to a writing are accompanied by seals, yet the words "to which the parties have set their hands," not adding "and seals," show that they did not mean to contract by deed. *Clement v. Gunhouse*, 5 Esp. C. 83.

2. An indorsement on a deed after it has been signed by the parties, but written at the same time with the sealing and delivery, is part of the deed. *Lyburn v. Warrington*, 1 Starkie, 162.

3. An authority to execute a deed may be verbal. *Williams v. Execution.* *Walsby*, 4 Esp. C. 220. *White v. Cuyler*, 1 Esp. 200; 6 T. R. 176.

4. A deed, though void, may be used as evidence of the terms of an implied simple contract arising out of the transaction. *White v. Cuyler*, 1 Esp. N. P. C. 200. S. C. 6 T. R. 176. Collateral matters.

5. The plea of *non est factum* is not a general issue. *Oldershaw v. Thompson*, 1 Starkie, 311. Pleadings.

6. Proof that the deed was delivered as an *escrow* is admissible, under the plea of *non est factum*. *Stoytes v. Pearson*, 4 Esp. C. 255.

7. The defendant cannot, under the plea of *non est factum* to a declaration upon a bond, to go into evidence to show that the consideration was an illegal one at common law. There is no distinction in such case between a specialty which is avoided by a statute, and one which is void at common law. *Harmer v. Wright*, 2 Starkie, 35.

8. If to an action on a deed *nil debet* is improperly pleaded and not demurred to, the defendant may give in evidence any defence which is legally covered by the plea. *Rawlins and another v. Danvers*, 5 Esp. C. 38.

## DEMURRAGE.

1. It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom-house officers, in unlawfully seizing a part of the cargo. *Bessey v. Evans*, 4 Camp. 131. When earned.

2. Although by the bill of lading the goods are deliverable to merchants in London, whose residence is well known, no notice to them of the ship's arrival is necessary to render them liable for demurrage. *Harman v. Mant and others*, 4 Camp. 161.

3. The plaintiff having conveyed French wines from *Oporto* to *England* for the defendant, it is incumbent on the defendant to procure an order for their landing from the lords of the treasury, and the plaintiff is entitled to recover the demurrage during the delay necessary for the obtaining such order. *Hill v. Idle*, 1 Starkie, 111.

4. A general ship took some silk on board, to carry from *Rotterdam* to *London* on defendant's account. On the margin of the bill of lading was written: "The consignee to clear the goods in fourteen running days after her arrival in port, or to pay 4*l.* per diem for demurrage." The vessel was ready to deliver on the 3d October; defendant applied for and was ready to receive his goods within the running days; but being undermost in the vessel, delivery could not be made till the 22d. Held, that the plaintiff was entitled to recover demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them. *Harman v. Guadolph and another*, 1 Holt, 35.

5. Where a bill of lading of goods by a general ship deliverable to order, contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, if there be any inaccuracy in the entry of the ship's name at the custom-house, whereby the owner of the goods, notwithstanding proper enquiries for that purpose, was deprived of the usual means of being informed of the ship's arrival, demurrage cannot be recovered. *Harman v. Clarke and others*, 4 Camp. 159. When not.

## DISTRESS.

What may be  
distrained.

Damage fea-  
sant.

Excessive.

Fraudulent re-  
moval.

Sale.

Expences of.

Driving out of  
the hundred.

1. Wearing apparel not in use may be distrained for rent. *Baynes v. Smith*, 1 Esp. N. P. C. 206; *Bisset v. Caldwell*, Id. n. \* *Peake*, 37.

2. Cattle can only be distrained *damage feasant* whilst on the premises, unless, as it seems, the distrainer gets upon the premises before they are off. *Clement v. Milner* and another, 3 Esp. C. 95.

3. A distress cannot be excessive where there is only one thing distrainable. *Field v. Mitchell*, 6 Esp. C. 71.

4. An action for taking an excessive distress lies without proof of express malice. *Field v. Mitchell*, 6 Esp. C. 72.

5. The statute 11 G. 2. c. 19., permitting landlords to follow goods removed to avoid a distress, only applies where the rent was arrear at the time of removal. *Watson v. Main*, 3 Esp. C. 15.

6. The statute 11 G. 2. c. 19., allowing landlords to follow goods removed to avoid a distress, only applies where they have been removed secretly. *Watson v. Main*, 3 Esp. C. 15. *Sed quare*, as the words of the statute are "fraudulently or clandestinely."

7. *Quare*, whether a landlord can follow and distrain upon goods fraudulently removed from the premises the night before the rent became due, for the purpose of avoiding a distress? *Fourneau v. Fotherby* and another, 4 Camp. 136.

8. Where the assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there: held, that they thereby became tenants to the lessor; and the cows being removed on the 10th, to avoid a distress for arrears of rent, that he had a right to follow and distrain them under 11 G. 2. c. 19. *Welch* and another v. *Myers*, 4 Camp. 368.

9. An appraisement of a distress by the person who makes it is irregular. *Westwood v. Cowne*, 1 Starkie, 172.

10. A landlord having authorised a distress for rent is liable for the necessary expences; and although the plaintiff was sent by the defendant to take possession of the goods distrained, who promised to pay him, the latter will not be liable without a note in writing. *Colman v. Eyles*, 2 Starkie, 62.

11. In an action on 1 & 2 P. & M., for driving a distress out of the hundred, if the hundred in which the cattle were distrained be in one county, and the hundred into which they were driven be in another, the *venue* must be laid in the latter county. *Pope q. t. v. Davies*, 2 Camp. 266; overruled by the court of C. P. 2 Taunt. 252.

## DONATIO CAUSA MORTIS.

What essential  
to the validity of.

1. To the validity of a *donatio causa mortis*, it is essential that the deceased parted as well with the entire dominion as the possession. *Hawkins v. Blewett*, 2 Esp. C. 663.

2. To make a gift valid as a *donatio mortis causa*, actual delivery of possession is necessary, and a symbolical delivery is not sufficient. Therefore, where *A.*, considering himself dying, takes certain property out of an iron chest, and writes the names of plaintiffs upon an envelope containing it, declaring it to be his intention that they should have such property upon his death; and after having super-scribed the envelope with their names, returns it to the chest, and keeps

keeps the keys in his own possession, never making any actual delivery thereof to the plaintiffs themselves, or to trustees for them: held, that such a gift or designation of the property was not good and effectual as a *donatio mortis caud.* *Bun v. Markham and wife*, 1 Holt, 352.

### EAST INDIA COMPANY.

If a ship be chartered to the East India Company for the purpose of trade or warfare, and they order her on a voyage of discovery, against the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. *Aliter*, if the owners consent to the voyage. *Lewin v. East India Company*, Peake, 241. Charter-party

### EJECTMENT.

1. Where a notice to quit, given by a rector to the tenant of his glebe land, expired on the 25th of *Dec.*, and on the 17th of *Jan.* following a sequestration was read in the church, and the rector afterwards, by order of the sequestrator, received from the tenant, who held over, a weekly allowance which he described in a receipt as issuing out of the tithe and glebe: held, that the rector might still maintain an ejectment, laying the demise on the 1st of *Jan.*; as between the 25th of *Dec.* and the 17th of *Jan.* the tenant was a trespasser. *Doe ex dem. Morgan v. Bluck*, 3 Camp. 447. By whom maintainable.

2. The plaintiff is entitled to recover in ejectment, although it appears that the defendant, who is in possession, is the mere servant of another, by whose permission he entered into possession. *Doe dem. Cuff v. Stradling*, 2 Starkie, 187.

3. An ejectment cannot be maintained by a *cestui que* trust. *Godfrey v. Hudson*, 2 Esp. C. 499. n.

4. The vendor of a term, before the whole of the purchase money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the mean time, and that if he does not pay the residue of the purchase money on that day he shall forfeit the instalments already paid, and shall not be entitled to an assignment of the lease. The purchaser being thus put into possession of the residue of the purchase money, is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit, or demand of possession. *Doe v. Sayer*, 3 Camp. 8. Notice to quit.

5. In ejectment, an undivided moiety of the premises may be recovered under a demise of the whole. *Doe ex dem. Bryant and another v. Wippel*, 1 Esp. C. 360. Pleadings.

6. When an ejectment is brought against a tenant at will, the demise must be laid subsequently to the determination of the will. *Doe ex dem. Hollingsworth v. Stennett*, 2 Esp. C. 717.

7. After the plaintiff in ejectment has proved his title to a verdict, the court will not try the question of the precise extent of the plaintiff's claim as defined by particular metes and bounds. *Doe on the demise of the Draper's Company v. Wilson*, 2 Starkie, 477. Trial.

8. If the plaintiff has been let into possession by the defendant, he may maintain trespass for the mesne profits without executing a writ of possession. *Calvert v. Horsfall*, 4 Esp. C. 167. Action for mesne profits.

## ELECTION.

## Voters.

1. An election by a majority is sufficient, though the electors are trustees. *Withnell v. Gartham*, 1 Esp. C. 322.; S. C. 6 T. R. 388.

2. Where the right of voting for a member to serve in parliament is in the inhabitant householders paying scot and lot, one who has been an inhabitant, and has paid poor-rates for many years, is entitled to a vote, although the poor-rates for three quarters of a year are in arrear at the commencement of the election, no personal demand having been made upon the party of the rates due, and no written demand having been left at his house; at all events, he is entitled to vote if he pay the rates during the election. *Cullen v. Morris*, 2 Starkie, 577.

## Committee.

3. An election candidate is bound by the acts of his committee. *Honeywood v. Sir W. Geary*, 6 Esp. C. 119.

## Expences.

4. A candidate at an election of members of parliament is not liable for any part of the expences of the election, except by positive statute, or his own undertaking, notwithstanding a long usage for the expences being rateably defrayed by the candidates. But a candidate to represent a city or a borough in parliament is liable for a share of the expence of administering oaths to Roman Catholic electors under 34 G. 3. c. 73.; and if he makes use of hustings erected by the returning officer, for the accommodation of himself or his agents, a promise on his part will be inferred to contribute to the expence of erecting them. *Morris v. Burdett*, 1 Camp. 218.

5. An action cannot be maintained by an innkeeper against a candidate at an election of members of parliament for provisions supplied to non-resident (any more than to resident) voters after the teste of the writ. *Lofthouse v. Wharton*, 1 Camp. 550. n.

6. If the candidates at a county election jointly desire the sheriff to erect hustings, to provide poll-clerks, and to retain an assessor, promising to defray the expence thus incurred, they are liable jointly to an action of *indebitatus assumpsit* at his suit upon their joint undertaking, notwithstanding statute 18 G. 2. c. 18. s. 7.

7. But the sheriff is not entitled to charge the candidates with any part of the expence necessarily incurred by him in executing the writ, and making the return; and for those things expressly ordered by the candidates, they are only bound to pay him a fair remuneration, although he himself may have paid more in submitting to exorbitant charges usually made on such occasions. *Wathew v. Sandys*, 2 Camp. 640.

## Action for refusing votes.

8. In an action against a returning officer for refusing a vote, the malice of the defendant is an essential ingredient to support the action. *Cullen v. Morris*, 2 Starkie, 577.

## ESCAPE.

## Rescue.

1. It is sufficient to excuse the sheriff in an action against him for a false return, "that the defendant forcibly rescued himself," provided the fact be so; but if the defendant escape, owing to the negligence of the officer, this will not justify the return of a rescue. *Fermor v. Phillips*, 1 Holt, 537.

## Recaption.

2. A person convicted of a crime by a court of competent jurisdiction is sentenced to pay a fine, and is committed in execution until that fine be paid. Although the officer to whose custody he is com-

committed voluntarily permit him to escape before payment of the fine, yet it is afterwards his bounden duty to retake him. *Butt v. Jones*, 1 Gow, 99.

### ESTOPPEL.

1. An affidavit of a fact made by *A.* at the request of *B.*, as the criterion of its existence, is conclusive against *B.* *Lloyd v. Willan*, 1 Esp. N. P. C. 178. Affidavit.
2. If the grantee of an annuity discontinues an action for the arrears, on a plea that the annuity is void through a defective memorial, the grantor is estopped from showing that the annuity is valid, when sued by the grantee for the consideration paid. *Este v. Broomhead*, 3 Esp. C. 261. Annuity.
3. An instrument is not evidence against an attesting witness thereto, unless it is proved that he was acquainted with its contents. *Harding v. Crethorn*, 1 Esp. N. P. C. 58. Attestation.
4. The person against whom a commission of bankrupt is sued out obtains his discharge out of custody, in an action, by a judge's order, on the ground of his bankruptcy; he is afterwards precluded from contesting the validity of the commission in a court of law. *Goldie v. Gunston and others*, 4 Camp. 381. Bankruptcy.
5. A confession that a signature on a bill is the party's own is conclusive against him with respect to those who took the bill on the faith of it. *Leach v. Buchanan*, 4 Esp. C. 226. Bill of exchange.
6. A bill of sale is conclusive evidence as against the parties, that the vendor was owner of the goods at the time of execution. *Phillips v. Eamer and another*, 1 Esp. C. 357. Bill of sale.
7. If *A.* proposes an agreement to *B.*, which *B.* accepts, the question still arises whether *A.* intended to be bound by it. *Knight v. Crockford*, 1 Esp. N. P. C. 190. Contract.
8. A party who has enjoyed an encroachment upon a common for more than twenty years, is not precluded from sharing such enjoyment when his title is disputed, by having subsequently accepted a conveyance of contiguous land, in which the land in dispute is described as *waste land*. *Doe ex dem. Bishop of London and another v. Wright*, 1 Starkie, 349. Encroachment.
9. If a person whose real name is *William* is asked before process issues against him whether his name is not *John*, and he says it is, he cannot maintain trespass for what is done in execution of the process against him by the wrong name. *Price v. Harwood*, 3 Camp. 108. Name.
10. A notice to quit by several jointly does not estop them showing that they are separately interested; therefore, the demises in ejectment may be according to those interests. *Doe ex dem. Joliffe v. Sybourn*, 2 Esp. C. 677. Notice to quit.

### EXECUTION.

1. Goods seized and sold by the landlord under a distress for rent without any collusion, and purchased by a trustee of the tenant's estate, under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity and judgment creditor, although they are permitted by the trustee to remain in the possession of the tenant. *Guthrie and another v. Wood*, 1 Starkie, 367. What may be seized.



## Sale under.

2. The sheriff having taken goods in execution under a *fi. fa.* is not justified in selling them to the highest bidder greatly under their value; but, if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers. *Keightley v. Birch and another*, 3 Camp. 521.

## Deduction for rent.

3. If upon the goods of a tenant being taken in execution, an agent of the landlord from the sheriff's officers gives an undertaking for a year's rent, and then consents to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff on 8 Ann. c. 11. s. 1. for not paying a year's rent on making the levy, although the rent is not paid according to the undertaking, and although the undertaking should be void, under the statute of frauds for not stating any consideration. *Rotherey v. Wood*, 3 Camp. 24.

## Return by Sheriff.

4. A sheriff having seized goods under a *fi. fa.* which he retains in his hands, conceiving that the sale made by his broker is fraudulent, is not justified in returning, that the goods remain in his hands for want of purchasers; he ought, in such case, to apply to the court for further time, on the ground of the special circumstances. But *semble*, in an action for a false return, under these circumstances, the inadequate price offered is the proper measure of damages. *Barnard and another v. Leigh and another*, 1 Starkie, 43.

## How impeached.

5. The validity of an execution under a *fi. fa.* cannot be impeached at *Nisi Prius*, on the ground that the judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ. *Habberton and another v. Wakelield*, 4 Camp. 58.

## Concurrent executions.

6. If a *fi. fa.* be delivered to the sheriff, and he is directed not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the second writ, as if no other had been delivered. *Kempland v. Macauley, Peake*, 66.

## EXECUTOR.

## De son tort.

1. A man who possesses himself of the effects of the deceased, under the authority, and as agent for the rightful executor, cannot be charged as executor *de son tort*. *Hall v. Elliot, Peake*, 86.

2. Taking the deceased's property under a colourable, though defective title, if *bond fide*, does not make the taker executor *de son tort*. *Femings v. Jarrat*, 1 Esp. C. 335.

3. Although a person cannot be charged as executor *de son tort* while he acts under a power of attorney, made to him by one of several executors, who has proved the will, yet if he continue to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved. *Cottle v. Aldrich*, 4 M. & S. 175. S. C. 1 Starkie, 37.

## Assets.

4. Money received by an executrix for the good will of a public house, is assets in her hands. *Worrall v. Hand, Peake*, 74.

5. As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the administrator's inventory to be desperate. *Giels and another v. Dyson and another*, 1 Starkie, 32.

6. A lease which belonged to an intestate, upon which the plaintiff has a *lien*, on account of which he retains it in his hands, is nevertheless

less to be considered as assets in the hands of the administrator who has the power to redeem it. *Vincent v. Sharp administratrix, &c.* 2 Starkie, 507.

7. A debt arising on a judgment not docketed pursuant to the Statutes 4 & 5 W. & M. C. 20., ranks in the administration of assets only as a simple contract. *Hickey v. Hayter*, 1 Esp. C. 313; S. C. 6. T. R. 384. Administration of assets.

8. *Seemle*, an administrator is entitled to deduct from assets the reasonable charges of collecting the intestate's debts. *Giles and another v. Dyson and another*, 1 Starkie, 32.

9. As against creditors, an administrator cannot be allowed for disbursements, in the schooling, feeding, or clothing the intestate's children, subsequently to his decease. *Giles and another v. Dyson and another*, 1 Starkie, 32.

10. If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. *Tugwell v. Heyman and another*, 3 Camp. 298. Funeral expenses.

11. If an executor carries on the testator's business, though for the benefit of his children, he is liable on contracts, and may be a bankrupt. *Viner v. Cadell*, 3 Esp. C. 88. Personal liability.

12. In an action by an executor, the fact that he is executor is admitted, unless disputed by the plea of *ne unques* executor. *Loyd v. Finlayson*, 2 Esp. C. 564. Pleadings.

13. Under a plea of *plene administrabit* to debt on a judgment which is not docketed, payment of bond, (and simple contract) debts exhausting all the assets, may be given in evidence. *Hickey v. Hayter*, 1 Esp. C. 313.; S. C. 6. T. R. 384.

14. If any part of an executor's plea is fraudulent, and so false within his own knowledge, the plaintiff is entitled to a general verdict. *Campion v. Bentley*, 1 Esp. C. 343.

15. If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *Quick and wife v. Stains*, 2 Esp. C. 657. S. C. 1 B. & P. 293. Miscellaneous.

16. Where an executor who is directed by the will to carry on the testator's trade, for the benefit of his children, allows a third person to carry it on in his own name; such person may sue on contracts made in relation to the trade, such as for goods sold or the like. *Wilkes v. Lister*, 6. Esp. C. 78.

## EXTENT.

*Quære*, Whether an extent delivered to a sheriff on the day on which goods seized under an execution, as sold and delivered to the purchaser, but which extent is delivered subsequently to the sale and delivery of the goods, be entitled to priority over the writ of the execution? *Swain v. Marland*, 1 Gow, 39. Priority of.

## EXTORTION.

- By Gaoler.** 1. If a gaoler take more than the legal fees, the prisoner may sue him for the excess, though he has paid it over to the regulating magistrates. *Miller v. Aris*, 3 Esp. C. 231.
- By Sheriff.** 2. The 50*l.* penalty against officers for extortion inflicted by Statute 32 Geo. 2. c. 28. is not recoverable, unless a table of fees has been previously made out pursuant to the statute. *Jaques v. Whitcomb* and another, 1 Esp. C. 361.; *Hannam v. Ormerod*, Id. n.; *Martin v. Slade*, 2 N. R. 59.
- By toll gatherer.** 3. The question of exemption from toll, cannot be tried in an indictment against the turnpike keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken. *Rex v. Hamlyn*, 4 Camp. 379.

## FISHERY.

- Nature of the right.** 1. A right of fishery is devisible, and may be lost as to part, and preserved as to part. Therefore an exclusive right to dredge for oysters in a navigable river may subsist as appurtenant to a manor, although it be lawful for all the king's subjects to catch floating fish therein. *Rogers v. Allen*, 1 Camp. 312.
2. A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor. *Rogers v. Allen*, 1 Camp. 312.
- Extent of the right.** 3. If an individual has a right of fishing in a navigable river, it is subject to the right of the public, to use the river for all the purposes of navigation. *Anon*, 1 Camp. 517. n.
- Statutes.** 4. To entitle a south-whaler to the bounty under statute 26 Geo. 3. and 28 Geo. 3. it must carry out, &c. one apprentice to every fifty tons, and the fact be verified by affidavit. An affidavit verifying the muster rolls of the vessel containing an account of the apprentices, which, if true, satisfied the requisitions of the statute, is sufficient. *Lacon and another v. Hooper and another*, 1 Esp. C. 249.
- Port.** 5. A place within the exchequer survey of a port is a member of it, and an arrival of a whaler there is an arrival at the port itself, (the same being the ship's port of discharge) within the statute 26 Geo. 3. and 28 Geo. 3. *Lacon and another v. Hooper and another*, 1 Esp. C. 246.

## FOREIGNERS.

- Contracts between.** An agreement between foreigners controlling a prior agreement, made in their own country, and for that reason void by the laws of that country, cannot be enforced here. *Hulle v. Heightman*, 4 Esp. C. 75.

## FOREIGN ATTACHMENT.

- Where it lies.** 1. The process of foreign attachment is confined to cases where both

both the debtor and party attached are resident in *London*. Lord Barrymore v. Taylor, 1 Esp. C. 326.

2. The process of foreign attachment does not lie where the debt to be attached is due to an executor. Lord Barrymore v. Taylor, 1 Esp. C. 326.

### FOREIGN JUDGMENT.

1. No action will lie upon a foreign judgment, on the face of which it appears, that the defendant, not resident within the jurisdiction of the foreign court, was neither served with process, nor came in to defend the action, although such judgment may have been obtained according to the course and practice of the court in similar cases. Buchanan v. Rucker, 1 Camp. 63. 180. b. Effect of.

2. The sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority. Donaldson v. Thompson, 1 Camp. 429.

3. *Assumpsit* will not lie on a decree of a foreign court, whereby the defendant is ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer; where the defendant's costs have been taxed, either at his own request, or upon an *ex parte* proceeding at the instance of the plaintiff. Sadler v. Robins, 1 Camp. 253.

4. The sentence of a French court in a country out of the jurisdiction of *France*, will not change the property, unless it has been acquiesced in. Smith v. Surridge, 4 Esp. C. 27., and *quare*, even then? See 8 T. R. 276.; 1 Camp. 429.

### FORGERY.

1. It is forgery to copy a receipt adding words which change its import, and give the copy in evidence, on the grounds that the original is lost. Upfold v. Leit, 5 Esp. C. 100. What is.

2. A forged order for the purpose of obtaining a reward for the apprehension &c. of a vagrant, is not a forgery within the statute of 7 Geo. 2. c. 22., unless it contain the requisites prescribed by the statute 17 Geo. 2. c. 5. s. 5., although it is drawn in the same form as orders in the county in which, &c. usually have been drawn. Rex v. Rushworth, 1 Starkie, 396.

### FRAUD.

1. A release obtained by fraud is void. Miller v. Aris, 3 Esp. C. 234. Release.

2. It is no defence to an action by a solicitor against an assignee under a commission of bankrupt, that the commission was sued out under a misrepresentation by the plaintiff, that the commission would be operative in the *Isle of Man*, and that it has been wholly fruitless, Bankruptcy.

for the commission cannot be treated as a mere nullity. *Pasmore v. Birnie*, 2 Starkie, 59.

### FRAUDS, STATUTE OF.

Writing, when necessary.

1. An undertaking by the indorser to indemnify the indorsee, if he would endeavour to enforce payment of the note against a party thereto, is an undertaking for the debt of another within the statute of frauds. *Winckworth v. Mills*, 2 Esp. C. 484.

2. A written proposal to pay a moiety of the debt of another, if the creditor will, at a specified time of meeting, accept the proposal and discharge the debtor, is not binding unless the creditor accede to the terms in writing. *Gaunt v. Hill*, 1 Starkie, 10.

3. *A.* having commenced certain business for *B.*, which he has undertaken, refuses to proceed without a promise from *C.* to pay the further expences; *C.* is not liable on such a promise without a note in writing. *Barber v. Fox*, 1 Starkie, 270.

Joint lessees.

4. If two lessees for their mutual accommodation, exchange premises, and one commits waste, for which the other is sued by the landlord, he cannot recover the costs *es nomine* of the action against the former, unless under a written agreement. *Hitchcock v. Hicks*, 1 Esp. N. P. C. 163.

5. A sale of lands, though by auction, is within the statute of frauds. *Walker v. Constable*, 2 Esp. C. 659.; S. C. 1 B. & P. 306.

6. An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, (the occupation to commence on a future day), is an agreement relating to an interest in land within the meaning of the fourth section of the statute of frauds. *Inman v. Stamp*, 1 Starkie, 12.

7. A parol assignment of a lease from year to year, granted by parol, is void under the statute of frauds, 29 Car. 2. c. 3. *Botting v. Martin*, 1 Camp. 318.

When not.

8. Goods are supplied by *A.* to *B.*, of which *A.* afterwards repossesses himself; whereupon *C.* tells *A.* that if he would send them to *B.*, he (*C.*) would pay for them. Held, that the credit was given to *C.* alone, and therefore that the promise need not be in writing. *Croft v. Smallwood*, 1 Esp. N. P. C. 121.

Writing, when necessary.

9. If *A.* incur a lawsuit through *B.*, in the event of which *B.* is interested and which he desires *A.* to defend, he is liable to *A.* for the costs of the defence without a note in writing. *Howes v. Martin*, 1 Esp. N. P. C. 162.

10. If a creditor at the request of a third person part with the possession of goods on which he has a lien for a debt, an undertaking by such third person to pay the debt need not be in writing. *Houlditch and another v. Milne*, 3 Esp. C. 86.

11. The statute 29 Car. 2. c. 3. s. 4. does not invalidate an executed parol contract, so as to prevent a party to it from maintaining an action for a breach of it, where the breach does not relate to an interest in land, although the contract itself stipulates that the defendant should be substituted as tenant in the stead of the plaintiffs, of premises then in their occupation. *Price v. Leyburn*, 1 Gow, 109.

12. The statute of frauds requiring a writing to the surrender of a lease, does not apply to tenancies from year to year, which therefore may

may be determined by any act of mutual consent, such as an acceptance by the landlord of another, in room of the tenant at the end of the year, and which acceptance supplies the want of a previous notice by the tenant that he will quit. *Sparrow v. Hawkes*, 2 Esp. C. 505.

13. To satisfy the statute of frauds, it is not necessary that the writing should be contemporary with the agreement; a subsequent note recognizing a previous parol contract is sufficient. *Shippey v. Donison*, 5 Esp. C. 190.

What writings  
are sufficient.

14. The words "I, A. B." in the party's own hand-writing at the head of an agreement, is a sufficient signature within the statute of frauds. *Knight v. Crockford*, 1 Esp. N. P. C. 190.

15. A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the statute of frauds. At all events a subsequent letter, written and signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute. *Saunderson v. Jackson and another*, 3 Esp. C. 180; S. C. 2 B. & P. 238.

16. The bought and sold notes given by brokers, are sufficient memoranda in writing within the statute of frauds. *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105.

17. The bought and sold notes sent by a broker to the vendor and purchaser, and who had been previously appointed by them, are a sufficient memorandum to satisfy the statute of frauds. *Chapman v. Partridge*, 5 Esp. C. 256.

18. *Quare*, whether the bought and sold notes made by a broker, are not sufficient to satisfy the statute of frauds, although he makes no entry in his book? *Dickenson v. Lilwal and others*, 1 Starkie, 128.

19. Where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognized the purchase. Held, that the entry in the catalogue and the letter, coupled together, were a sufficient memorandum of the contract within the statute of frauds. *Phillimore v. Barrey*, 1 Camp. 513.

20. An agreement in writing, by which the defendant undertook to guarantee the payment of any goods which the plaintiff should deliver to a third person, sufficiently expresses the consideration for the defendant's undertaking, to render the agreement binding, under the 4th section of the statute of frauds; although it contains no promise on the part of the plaintiff to deliver goods, and no action would have lain upon it against him. *Stapp v. Lill*, 1 Camp. 242.

21. A, an agent for some manufacturers sells to B., who likewise acted as an agent, a quantity of shoes, and receives certain bills of exchange in payment, B. being pressed to indorse them refuses, but writes a letter to A., in which he incloses the bills, and adds. — "that should they not be honoured when due, he (B.) would see them paid." Held, that this was a sufficient agreement within the 4th section of the statute of frauds to bind B. to pay for the goods, in default of his principal. *Norris v. Stacey*, 1 Holt, 153.

22. A note in writing of a contract of sale, not specifying to whom the goods were sold, is not a sufficient memorandum within the statute of frauds. *Champion and another v. Plummer*, 5 Esp. C. 240.; S. C. 1 N. R. 252.

What not.

23. The

## Delivery.

23. The statute of frauds does not attach where there has been a delivery in part, or in all, of goods sold; and a written order for delivery given by the vendor to the vendee, on an acceptance by the person in possession, is a sufficient delivery within the statute. *Searl and another v. Keeve*, 2 Esp. C. 598.

24. If goods are ordered verbally, the delivery of them to a carrier is sufficient to bind the contract according to the statute of fraud, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance. *Hart and another v. Sattley*, 3 Camp. 528.

25. If the purchaser of goods, at the time of the sale, write his name upon a particular article, with intent to denote that he has purchased it, and to appropriate it to his own use, this is enough to take the sale, as to the article written upon, out of the statute of frauds, but not as to other articles bought at the same time. *Hodgson v. Le Bret*, 1 Camp. 233.

26. So where wine was sold in the cask, held, that cutting off the spills and marking the purchaser's initials on the casks, took the case out of the statute. *Anderson v. Scot*, 1 Camp. 235. n.

27. Where a sample is delivered as part of the property sold, the delivery is sufficient within the statute of frauds. *Klinitz v. Surry*, 5 Esp. C. 267.

28. The delivery of a sample which is no part of the thing sold, will not take a sale out of the statute of frauds; but if the sample be delivered as part of the bulk, it then binds the contract. *Talver and another v. West*, 1 Holt, 178.

## Agent.

29. An agent appointed by the vendor in the sale of the property, is an agent for the vendee as well within the statute of frauds. *Hicks v. Haukin*, 4 Esp. C. 114.

30. A memorandum of the sale of goods under the 17th section of the statute of frauds, cannot be signed by one of the contracting parties as the authorised agent of the other: the agent must be a third person. *Wright v. Dannah*, 2 Camp. 203.

31. An auctioneer for the sale of lands, is not an agent for both parties within the 4th section of the statute of frauds, 29 Car. 2. c. 3. *Stansfield v. Johnson*, 1 Esp. N. P. C. 101. But see *Emmerson v. Heelis*, 2 Taun. 38.

## FRAUDULENT CONVEYANCE.

## What is.

1. An assignment of personal property is void as against creditors, unless there be a complete change of possession; and it is not enough that a person is put in to keep possession jointly with the assignor. *Wardhall v. Smith*, 1 Camp. 333.

2. If after possession taken under a bill of sale, the vendor is permitted to deal with the property as usual, the sale is void against creditors. *Paget and another v. Perchard and another*, 1 Esp. N. P. C. 205.

3. If a person who has been discharged under an insolvent act, which vests his effects in the clerk of the peace until an assignee is appointed, be permitted by the body of his creditors to continue in possession of the effects which belonged to him before his discharge, no assignee being appointed; these effects, whether mentioned in his schedule or not, cannot be taken in execution by a creditor, who afterwards

wards obtains judgment against him. *Hindle v. Bell* and another, 4 Camp. 383.

4. Allowing the vendor to remain in possession after sale is only presumptive, not conclusive evidence of fraud as against creditors, and may therefore be explained away. *Hoffman v. Pitt*, 5 Esp. C. 25. What is not.

5. Where goods are sold by public auction, and the seller, after a *bond fide* sale, is allowed to continue in the possession of them, they cannot be taken in execution by one of the seller's creditors who was present at the sale, since the transfer was open and notorious, and there was a good consideration to support it. *Armstrong v. Baldock*, 1 Gow, 35.

6. If an assignment be made of household furniture, and the assignor continue in the possession of it, it is not protected against an execution, at the suit of a creditor of the assignor, unless the assignment were notorious. In such cases, the notoriety of the change of possession is the question to be ascertained. *Armstrong v. Baldock*, Esq. 1 Gow, 33.

7. The goods of *A.* having been taken in execution and put up to sale, *B.* became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession; *A.* then executed another bill of sale of the same goods to *C.* a creditor, under which the latter took possession whereupon *B.* brought an action against *C.* for the goods. Held, that the first bill of sale was valid, and therefore that *B.* was entitled to recover. *Kidd v. Rawlinson*, 3 Esp. C. 52. S. C. 2 B. and P. 59.

## FREIGHT.

1. Freight cannot be recovered on a charter party, unless the stipulated voyage has been actually performed: and there is no implied promise to pay a compensation for carrying goods a part of the voyage, unless they are voluntarily accepted at a place short of the port of destination. *Osgood v. Groning*, 2 Camp. 466. When earned.

2. Where a ship is freighted in contravention of the navigation laws, although the consignee accept the goods and sell them, he is not answerable in an action for the freight. *Blank v. Solly*, 1 Holt, 554.

3. The consignee alone, unless unknown, of goods shipped under a bill of lading to the order of the shipper is the party liable for freight, not the indorsee of the bill, or vendee in whose name the goods have been entered at the custom house. *Artaza v. Smallpiece*, 1 Esp. N. P. C. 23. But see *Cock v. Taylor* and another, 13 East, 399, 2 C. N. P. C. 587. Who liable for.

4. Any one, though another may be consignee or indorsee of the bill of lading, who accepts goods on his own account, is chargeable with their freight. *Secgart v. Scott* and others, 6 Esp. C. 22.

5. If, by a bill of lading, goods are made deliverable to *A.* or his assigns, he or they paying freight for the same, and *A.* assigns the bill of lading to *B.*, and *B.* assigns it to *C.*, who accepts the goods under it, *C.* is liable to an action for the freight at the suit of the master of the ship. *Cook v. Taylor*, 2 Camp. 587.

6. The indorsee of the bill of lading of goods shipped by a chartered vessel, deliverable to the consignee or his assigns, he or they paying freight according to the terms of the charter party, is liable to the char-



charterer in assumpsit for the freight ; though the goods were landed at the *West India* docks before the bill of lading was indorsed ; though no stop was put on the goods at the dock ; and though the indorsee had paid over the proceeds before the freight was demanded of him. *Bell and another v. Kymer and others*, 5 Taunton, 477. ; S. C. 3 Camp. 545.

Amount of.

7. Goods shipped from abroad and consigned to a merchant in this country, are to be paid for (upon a demand for freight) according to their *net* weight as ascertained at the king's landing scales, and not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them. *Geraldes v. Donison*, 1 Holt, 346.

8. *A.* undertakes to smuggle certain goods belonging to *B.*, into *Russia*. A regular bill of lading is made out of the goods, in which the freight charged is the usual freight according to the bulk of the goods. But a second contract is made between the parties, by which *B.* undertakes to pay *A.* a larger sum of money if the goods should be safely landed in the foreign port. The goods are landed ; *B.* pays the freight under the bill of lading, and likewise part of the money under the agreement, but refuses to pay the remainder. Held, that notwithstanding the bill of lading he was liable to pay the residue as *extra* freight. *Hedley v. Lapage*, 1 Holt, 392.

9. A ship let to freight by the month, in attempting to enter a blockaded port by order of the freighters, is seized, and her cargo condemned ; but being afterwards released, takes in other goods and delivers them to the freighters, according to the charter-party. Held, that there was no suspension of the freight during the detention of the ship. *Moorsom v. Greaves*, 2 Camp. 627.

10. *A.* having shipped goods on board of a vessel which is driven into a foreign port by stress of weather, part of these goods are sold by the Captain to defray the expences of repairing the vessel, *A.* is entitled to deduct from the demand, for freight, the sum for which the goods have been sold. And the circumstance of the ship-owners having, during the voyage, assigned the freight to a third person makes no difference. *Camp. v. Thompson*, 1 Starkie, 490.

Miscellaneous.

11. If the freighter of a ship employed to bring a cargo of wine into the port of *London*, covenant to unload her in the usual and customary time at her port of discharge, he is not liable for the detention of the ship in the *London docks*, if she is there unloaded in her turn into the bonded warehouses. *Rogers v. Foresters*, 2 Camp. 483.

## FRIENDLY SOCIETY.

Regulations of.

1. An action cannot be maintained by the trustees of a benefit society elected under new regulations agreed to by the members, unless these regulations have been confirmed by the quarter sessions, although the original rules of the society were enrolled, in pursuance of 33 Geo. 3. c. 54. *Bathey and another v. Townrow*, 4 Camp. 5.

Jurisdiction over.

2. A friendly society whose rules have been allowed by the magistrates, and registered in *London*, afterwards hold their meetings in *Middlesex* ; the justices of *Middlesex* have jurisdiction to decide upon complaints made by members of the society. *Rex v. Gash and another*, 1 Starkie, 441.

3. Upon

3. Upon a complaint made by an excluded member of a friendly society, *A.* and *B.*, the then stewards, are duly summoned, and an order is made by two justices, that such stewards, and other members of the society shall forthwith re-instate the complainant. The order is served upon *A.* and *B.*, after they have ceased to be stewards; but it is still obligatory upon them as members of the society to attempt to reinstate the complainant, and their having ceased to be stewards is no justification of entire neglect on their part. *Rex v. Gash and another*, 1 Starkie, 441.

### GAME.

1. Where game is accidentally killed by an unqualified person, he is not therefore liable to a penalty; but if he afterwards takes it away he is liable for having game in his possession. *Molton v. Cheeseley*, 1 Esp. N. P. C. 123.; see *Warneford v. Kendall*, 10 East, 19. Construction of the game laws.

2. One not licensed or qualified to hunt game may lawfully join in the sport with one who is; but he cannot use his own dogs. *Molton v. Rogers*, 4 Esp. C. 215.

3. To complete the offence under the game certificate act, not only is a refusal to produce the licence requisite; the party must refuse to give his christian and surname, and place of residence. *Molton v. Rogers*, 4 Esp. C. 215.

4. The statute 13 Geo. 3. c. 80. gives a penalty in case of killing game on a Sunday, and directs that it shall be forthwith paid on conviction; and that in case of neglect or refusal to pay or give security for the payment of it, the justice shall, by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held, that such order to detain in custody until the return of the warrant of distress may be by parole. *Still v. Walls and another*, 6 Esp. C. 36.; S. C. 7 East, 533.

5. Bodies corporate, who are lords of manors, are not prevented by statute 3 Geo. 1. c. 11. from appointing qualified persons their gamekeepers. *Spurrier v. Vale*, 1 Camp. 457. Gamekeeper.

6. A deputation to a gamekeeper who is neither himself qualified to kill game, nor is a servant to the lord of the manor, need not state on the face of it, that he is appointed to kill game for the use of the lord; and it will be presumed, that whatever game he kills, is for the lord's use, till the contrary is proved. *Spurrier v. Vale*, 1 Camp. 457.

7. Though two offences against the statute 5 Anne c. 14. are established by a single act, only one penalty can be recovered. *Molton v. Cheeseley*, 1 Esp. N. P. C. 123. Penalty:

### GAMING.

1. The statute 9 Anne c. 14. only avoids securities for money lent to play with; therefore money lent without security is recoverable. *Wettenhall v. Wood*, 1 Esp. N. P. C. 18. Construction of the statute of Anne.

2. A sum under 10*l.* fairly won at play is recoverable. *Bulling v. Frost*, 1 Esp. C. 235.

## GAZETTE.

Notice by.

Notice in the gazette is sufficient to make one liable for penalties; thus in the case of smuggling and outlawry. *Godfrey v. Turnbull* and another, 1 Esp. C. 372.

## HABEAS CORPUS.

Construction of  
the Habeas  
Corpus Act.

1. A prisoner committed to an English gaol under a warrant from the Secretary of State for Ireland, removing him thence that he may be brought before a judge for an offence in England with which he is charged, is entitled to a copy of the commitment within the *Habeas Corpus* act, 31 Car. 2. c. 2. s. 2. *Sedley v. Arbouin*, 3 Esp. C. 174.

2. If a gaoler has incurred the penalties of the *Habeas Corpus* act, 31 Car. 2. c. 2. s. 2. by a refusal to a prisoner of a copy of the commitment, he is not discharged by the prisoner afterwards accepting a copy. *Sedley v. Arbouin*, 3 Esp. C. 174.

## HAWKER.

Licence.

A licensed hawker who gives his licence to be used by his servant employed to sell goods on his account, is not liable on 29 Geo. 3. c. 26. as for letting to hire or lending the licence. *Hodgson q. t. v. Flower*, 2 Camp. 288.

## HIGHWAY.

What is.

1. If a passage leading from one part to another of a public street (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain across it, and without any person passing through it meeting with interruption, it is to be considered as dedicated to the public, and it becomes a highway, to obstruct which is an indictable offence. *Rex v. Lloyd*, 1 Camp. 260.

2. But the erection of a bar although it may have been knocked down, rebuts the presumption of a dedication to the public. *Roberts v. Karr*, 1 Camp. 262. n. *Lethbridge v. Winter*, 1 Camp. 263. n.

Repairs.

3. If an encroachment upon a highway, an archway for instance, can be proved to be such, the person who has been in the habit of repairing it by removing it, and restoring the road to its former state, discharges himself from further repairs. *Rex v. Skinner*, 5 Esp. C. 219.

4. Although a statute enacts, that the paving of a particular street shall be under the care of commissioners, and provides a fund to be applied to that purpose, and another statute passed for paving the streets of the parish, contains a clause that it shall not extend to the particular street, the inhabitants of the parish are not exempted from their common law liable to keep that street in repair. *Rex v. Inhabitants of St. George, Hanover-square*, 3 Camp. 222.

Transit.

5. *Semble*, that where an injury results from the collision of two carriages passing in opposite directions, the driver of that which is  
on

on the wrong side of the road is not therefore in fault, if the other might have avoided him; at least if the other, seeing him approach, crossed over. *Cruden v. Fentham*, 2 Esp. C. 685.

6. One driving along the road is not excused an accident which he might have avoided, because the other was on the wrong side. *Clay v. Wood*, 5 Esp. C. 44.

7. It is sufficient for a driver to leave sufficient room on the right hand side of the road for carriages coming in an opposite direction to pass, without keeping within his proper track. *Wordsworth v. Willan* and others, 5 Esp. C. 273.

8. If the driver of a carriage upon a public road may adopt either of two courses one of which is *safe* and the other *hazardous*, and he elects the latter, he is responsible for the mischief which ensues. And he cannot in such case insist upon the fact, that he kept to his own side of the road. *Mayhew v. Boyce*, 1 Starkie, 423.

9. An indictment against a parish for not repairing one side of the road, (the other side lying in another parish) ought to state that parish was liable to repair *ad medium filium viæ*, and not merely that a certain part of the road in breadth 15 feet was out of repair. A record of conviction on an indictment against a parish for not repairing a road is conclusive evidence of the liability of that parish to repair. *Rex. v. St. Pancras*, Peake 220. Pleadings.

10. Where the burthen of repairing a highway is transferred by a public act of parliament from the parish to other persons, if the parish be indicted for not repairing this highway, there is no occasion for a special plea, stating who are bound to repair it; but the exemption may be taken advantage of under the general issue of *not guilty*. *Rex v. Inhabitants of St. George, Hanover-square*, 3 Camp. 222.

11. A plea by the inhabitants of a parish, that the inhabitants of a particular district are bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, (and which one is of recent date) need not state by whom the excepted highway is repairable. *Rex v. the Inhabitants of Ecclesfield*, 1 Starkie, 393.

## HUNDRED.

1. To render the hundred liable on the riot act for partial damage done to a house, the rioters must have begun to demolish it with the intention of actually demolishing it, if not interrupted. *Lord King v. Chambers* and another, 4 Camp. 377.; S. C. 1 Starkie, 195. When liable for outrages.

2. In an action against the hundred, held, that they are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods stolen or lost from the premises. *Smith v. Bolton*, 1 Holt, 201.

3. If a mob attack a house with intent to liberate a person in custody in that house, or to pull the house down in case he be not delivered up, and proceed to acts of violence, this is a sufficient beginning to demolish as far as intention goes, to entitle the owner to his remedy against the hundred under the statute 1 G. 1. st. 2. c. 5. Damages may be recovered in respect of guns found in the house and used and damaged in the course of demolition. But not in respect of guns stolen by the mob. *Beckwith v. Wood* and another, 2 Starkie, 263.

4. A house, part of which is occupied by the plaintiff as a shop, and the remainder of which is occupied by lodgers, no part of his family sleeping therein, is a dwelling-house within the protection of the statute 1 G. 1. statute 2. c. 5. *Rea v. Wood* and another, 2 Starkie, 269.

5. In an action on the riot act, and upon the 52 Geo. 3. c. 130. against the hundred; held that burning, though specifically mentioned in a clause of the statute, as distinct from a demolishing or pulling down, is included in the latter terms. *Nesham and others, v. Armstrong and others*, 1 Holt, 466.

6. *Quare*, if a staith, which is a place of deposit for coals, is an erection, building, or engine, within the meaning of the first and second sections of the 52 Geo. 3. c. 130.? *Nesham and others, v. Armstrong and others*, 1 Holt, 466.

Pleadings.

7. In an action against the hundred on the statute to recover damages for mischief done to a dwelling-house by a mob, it is not necessary to show that the object of the mob was seditious. *Clarke v. Burdett, Bart. and another*, 2 Starkie, 504.

### ILLEGAL AND LEGAL, VALID AND VOID.

Administration  
of justice.

1. The compounding of a misdemeanor is a good consideration for a contract. (The misdemeanor in this case was a fraud). *Drage v. Ibberson*, 2 Esp. C. 643.

2. Money deposited with a stake-holder to be paid to a third person for using his interest in procuring the pardon of an offender, cannot be recovered back. *Norman v. Cole*, 3 Esp. C. 253.

3. If *A.*, the indorsee for value of a bill of exchange, to which *B.*, the indorser, had forged the acceptance of *C.*, delivers it up to *B.* on his solicitation, and receives from him, in lieu thereof, a bill accepted by *D.* without consideration, *A.* may maintain an action on this bill against *D.*, unless there was an agreement between him and *B.* to stifle a prosecution for forgery. *Wallace v. Hardacre*, 1 Camp. 45.

4. An agreement by the payee of a bill of exchange, to discharge a person liable upon it, in consideration that the latter would not move the Court of King's Bench against him for a misdemeanor, is illegal and void. *Pool v. Bonsfield*, 1 Camp. 55.

5. Upon a conviction before magistrates for a breach of the excise laws, a warrant to levy the penalties is directed to an excise officer, who, by way of indulgence to the party, takes from him a promissory note at two months for the amount, without previous authority from his superiors. Held that the promissory note so given was a valid security. *Sugars v. Brinkworth*, 4 Camp. 46.

6. An agreement to forego a criminal prosecution is illegal, but the plaintiff may recover a bill given by the defendant for the costs of a civil proceeding against *B.*, and the amount of a composition with *B.*, although the plaintiff has instituted a prosecution against *B.*, which he afterwards abandons, unless it be expressly proved that the abandonment of the prosecution formed part of the consideration for the bill. *Harding and others v. Cooper*, 1 Starkie, 467.

Alien enemy.

7. Goods the produce of Holland purchased in that country during hostilities between Holland and Great Britain, by a British agent resident there, and shipped to British subjects were insured by them in this country; held that this was a legal insurance. *Bell v. Potts*, 2 Esp. C. 712.; S. C. 1 B. & P. 345.; but judgment reversed 8 T. R. 548.

8. A Frenchman domiciled at Lisbon consigns a cargo, which is his property to Nantes, under the name of a native Portuguese, who acts as 'neutralizer;' the ship being taken and brought into an English port, the cargo is libelled in the Court of Admiralty; the Portuguese with the privity of the Frenchman claims it, and it is decreed to be delivered up to him as neutral property. Held, that an action at law could not afterwards be maintained by the Frenchman against the Portuguese to recover the proceeds of the cargo. *De Mellow v. De Mellow*, 2 Camp. 420.

9. An action may be maintained here by a neutral, on promissory notes given to him by a British subject in an enemy's country for goods sold there. *Houret and another v. Morris*, 3 Camp. 303.

10. Although a bill drawn by a prisoner of war in France in 1795, upon a person resident in England in favour of an alien enemy could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace to pay principal and interest. *Duhammel v. Pickering*, 2 Starkie, 90.

11. A bond conditioned for the service of an apprentice under a binding void by statute 5 Eliz. c. 31. is likewise void. *Burney v. Jennings*, 6 Esp. C. 8. Apprentice.

12. Parties may come to an agreement to dispense with the formalities of the building Act. If the occupier of premises, the owner of the improved rent of which is liable to the rebuilding of a party wall, voluntarily assumes the responsibility by a promise, (not in writing) there is a sufficient consideration to support an action on such promise, resulting from this occupation of the adjoining premises; and this is evidence to be left to the jury that he is owner of the improved rent. Especially in a case where there is evidence of his having subsequently offered his lease to sale for a sum of money in gross. *Stewart v. Smith*, 1 Holt, 321. Building Act.

13. Where a promissory note is given for another note, the consideration of which is not *malum in se*, or the note declared void by statute, but *malum prohibitum* only, it is valid. *Witham v. Lee*, 4 Esp. C. 264. Collateral security.

14. *B.* being employed by *A.* to purchase for him certain transferrable shares in an unincorporated company, charged and received from him 25*l.* beyond the market price of such shares at the time. Held, that an action would not lie to recover back this sum, the company being within 6 Geo. 1. c. 18. and the parties in *pari delicto*. *Buck v. Buck*, 1 Camp. 547. Company.

15. An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to one of these companies; and to collect subscriptions for them as secretary, comes so near to obtaining money upon false pretences, that if a man is indicted for so doing, he cannot be considered as prosecuted without any reasonable or probable cause. *Rex v. Stratton*, 1 Camp. 549. n.

16. An agreement signed by a person in a state of complete intoxication is void. *Pitt v. Smith*, 3 Camp. 33. Drunkenness.

17. In an action for work and labour, proof that the plaintiff was in a state of intoxication when he signed that which is insisted on by the defendant as an agreement, dispenses with the necessity of producing it. *Fenton v. Holloway*, 1 Starkie, 126.

18. A contract tainted with fraud is voidable by the innocent party, who will then be remitted to his original rights. Hence if *A.* undertake to *B.* for what he cannot perform, *B.* may, on discovering the cheat, immediately recover back the consideration paid, though by Fraud.

by the terms of the contract it was to be repaid only on default of performance by a future day. *Hogan v. Shee*, 2 Esp. C. 522.

## Gaming.

19. *A.* lays a wager of twenty-five guineas with *B.* upon the event of a horse-race, and he takes the risk of ten guineas (part of the twenty-five) as his share of it. *A.* wins the wager, but before he receives the money from *B.* he pays *C.* ten guineas, as his portion of the bet. *B.* never paid the wager to *A.*, and all hope of obtaining it was lost. Held, that *A.* was entitled, notwithstanding the statutes of gaming, to maintain an action of money had and received against *C.* for the ten guineas which he had paid him. *Simpson v. Bliss*, 1 Holt, 273.

## Goodwill and custom.

20. An agreement to procure a situation for a medical man by the assignment of patients by a third person to whom a premium is to be paid, is not illegal. *Edgar v. Blick*, 1 Starkie, 464.

21. A contract to pay a poundage on goods sold by the one party to customers recommended by the other, is illegal. *Wyburd v. Stanton*, 4 Esp. C. 179.

## Immorality.

22. A contract of an immoral tendency is void; therefore the price of indecent prints sold cannot be recovered. *Fores v. Johnes*, 4 Esp. C. 97.

## Insurance.

23. A policy of insurance on money lent to the captain payable out of the freight is illegal, and the premium cannot be recovered back from the underwriters. *Wilson v. R. E. Ass. Co.* 2 Camp. 626.

## London broker.

24. *Semble*, if a broker make a contract contrary to the regulations of the city of London, and in violation of the bond into which he has entered with the Mayor, Aldermen, &c. he is not therefore disqualified from bringing an action on a contract so made in contravention of his duties under the bond. The remedy against him is an action for the penalty of the bond, and the contract is not, *ipso facto*, void. *Kemble and others v. Atkins and another*, 1 Holt, 427.

## Particeps criminis.

25. One drawn in and made party to an illegal transaction by the artifice of another is not *particeps criminis*, and is therefore remitted to his original right. *Drummond v. Deey*, 1 Esp. C. 152.

26. One who is innocently engaged by another in an illegal transaction may recover a remuneration for his services. *Strongitharm v. Lukyn*, 1 Esp. C. 389.

## Prostitution.

27. A contract *contra bonos mores* is void; such as the letting of lodgings for the purposes of prostitution. *Girardy v. Richardson*, 1 Esp. N. P. C. 13.

28. If articles of dress are sold to a woman of the town, an action will lie to recover their value, although the seller knew the way of life of the purchaser; unless he furnished them with a view to enable her to carry it on, and he expected to be paid from the profits of her prostitution. *Bowry v. Bennett*, 1 Camp. 348.

## Russian trade.

29. *A.* contracts to sell to *B.* some Russian hemp; and the ship on board of which the hemp is to be conveyed is to sail from St. Petersburg by a given day. *A.* is the importer of the hemp. By the statute 10 & 11 W. 3. c. 6. it is illegal for any subject of this realm to carry on a trade with Russia, unless he be a member of the fellowship of merchants trading to those countries. *A.* is not a member of the company; but the hemp is protected at the landing scale and in the docks, by using the name of a broker, who was one of the fellowship. *Quere*, if this be such an illegality in the contract as will render it void, and entitle *B.* to avail himself of it as a defence to an action brought against him by *A.* for not fulfilling his agreement? *Gross and another v. La Page*, 1 Holt, 105.

30. A note given by a principal to his broker for the amount of differences arising out of illegal stock-jobbing, which the broker had paid himself, is void in the hands of an indorsee, who took it with knowledge of the whole affair. *Steers v. Lashley*, 1 Esp. N. P. C. 166.; S. C. 6 T. R. 61. Stock-jobbing.

31. A foreigner who sells goods outright abroad, which he knows are intended to be, and which he packs for the purpose of being, smuggled into this country, cannot sue here for the price. *Bernard and another v. Reed*, 1 Esp. N. P. C. 91.; S. C., by the name of *Waymell v. Reed and another*, 5 T. R. 599. Trade.

32. A voyage from this country to a place surrendered to His Majesty's arms, commenced after the period at which, according to articles of capitulation published in the London Gazette, it was to be restored to the enemy, and after in fact it was restored, is not illegal, if intelligence of that event had not reached England when the ship sailed, and the object of the adventure was not a trading with the enemy. *Atkinson v. Abbott*, 1 Camp. 535.

33. Policy from London to a foreign port, "on goods as should thereafter be declared, each package to pay average, the same as if it were separately insured." A small quantity of naval stores was afterwards mentioned in the specification of interest, and exported in the vessel with the other goods insured, without a licence, contrary to a proclamation authorized by 33 G. 3. c. 2.: held, that the policy was entirely vitiated, and that the assured could not recover for that part of the goods the exportation of which was legal. *Parkin v. Dick*, 2 Camp. 221.

34. A voyage to a Prussian port is not illegal, as being a trading with an enemy, although our commerce is entirely excluded from the ports of Prussia, and there be no diplomatic intercourse between the two countries. *Muller v. Thompson*, 2 Camp. 610.

35. Since the 19th of May, 1806, the trading between this country and ports and places in the island of *St. Domingo*, not under the dominion and in the actual possession of His Majesty's enemies, has been lawful without any licence. *Blackburn v. Thompson*, 3 Camp. 61.

36. Where a licence is granted for a voyage to a hostile country to continue in force till a given day; if the voyage is *bona fide* begun before that day, it continues to be protected by the licence, though delayed beyond the day by stress of weather or other accident, over which the assured have no control. *Groning v. Crockett*, 3 Camp. 83.

37. In an action for not accounting for goods delivered in this country to the defendant, the master of a ship, to be sold by him abroad, it is no defence that the goods were exported without paying duties, unless it be proved that the evasion of the duties was part of the agreement between the plaintiff and defendant. *Catlin v. Bell*, 4 Camp. 183.

38. A licence by the crown "to *A.* and *B.* on behalf of themselves and other British or neutral merchants, permitting the vessel *I.* to sail in ballast from *London* to *Holland*, notwithstanding any thing contained in His Majesty's order in council of 26th April, 1809:." held to be insufficient to legalize a policy of insurance on the ship in this voyage, on behalf of the owner, who was an alien enemy. *Grigg and another v. Scott*, 4 Camp. 339.; S. C. 1 Holt, 129.

39. If articles not specified in a licence to import, be imported  
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along with others which are specified : *semble*, the licence will still insure to the protection of those articles which are specified. *Butler v. Almutt*, 1 Starkie, 222.

40. A prospective licence from the crown for a voyage from an enemy's country, granted after the voyage has commenced, is insufficient to render it legal : but, if the parties to a policy of insurance on this voyage contemplated the obtaining of a licence, the premium may be recovered back by the assured from the underwriters. *Henry and others v. Staniforth*, 4 Camp. 270. ; S. C. 1 Starkie, 254.

41. A licence granted to a ship to sail in ballast from *London to Holland* (which country was at that time in a state of hostility), notwithstanding any thing contained in His Majesty's order of council of *April*, 1809: held not to protect a ship which was the property of an alien enemy. An insurance, therefore, on such vessel is void. *Gregg v. Scott*, 1 Holt, 129.

Usury.

42. An usurious indorsement of a bill, good in its original, does not vitiate it in the hands of a subsequent and *bond fide* holder. *Daniel v. Cartony*, 1 Esp. C. 274.

43. If a bill of exchange is drawn upon an agreement between one of the original parties to it and a person not a party to it, that the latter shall get it discounted by another person likewise not a party to the bill, upon usurious terms, and it is so discounted accordingly ; the bill is void for the usury, in the hands of an innocent indorsee. *Young v. Wright*, 1 Camp. 141.

44. A bill of exchange is void in the hands of a *bond fide* indorsee, if it was drawn in consequence of an usurious agreement for discounting it, although the drawer, to whose order it was payable, was not privy to this agreement. *Ackland v. Pearce*, 2 Camp. 599.

45. If an usurious security be given for a legal subsisting debt, although the security is void, the debt is not extinguished. *Phillips v. Cockayne*, 3 Camp. 119.

46. The payee of a bill of exchange indorses it upon an usurious contract at the time of the contract: a *bond fide* holder cannot afterwards recover upon it against the acceptor. *Lowes and others v. Mazzaredo and others*, 1 Starkie, 385.

47. A party cannot recover on a new instrument which operates as a security for any usurious interest, although it is founded upon a new settlement of the account between the borrower and the lender, and the original securities have been cancelled. *Preston v. Jackson*, 2 Starkie, 237.

48. *A.* employs *B.* to get a bill discounted, and agrees to give him a sum of money beyond the legal interest ; *B.* procures *C.* to discount it, who requires *B.* to indorse the bill, but takes no more than the legal interest upon the discount. *B.* then pays over to *A.* the proceeds of the bill, *minus* the sum which *A.* had agreed to give him for procuring the discount: held, that in an action against *A.*, brought by the indorsee of *C.*, *A.* could not defend himself on the ground of usury between him and *B.* *Jones v. Davison*, 1 Holt, 256.

Wager.

49. Where a sum has been deposited on the event of an illegal wager, it may be recovered back by the loser after the event. *Lacassade v. White*, 2 Esp. C. 629. ; S. C. 7 T. R. 535. But see 8 T. R. 575.

50. An action cannot be maintained upon a wager, whether an unmarried woman has had a child. *Ditchburn v. Goldsmith*, 4 Camp. 152.

## IMPRISONMENT.

1. Verbally giving in charge to a constable, who neither touches nor takes the party into custody, is not an imprisonment. *Simson v. Hill*, 1 Esp. C. 431. What is.

2. Commissioners of bankrupt make a warrant for the commitment of a bankrupt for refusing to be examined, the bankrupt being already confined in the King's Bench under previous process: *semble*, the issuing of the warrant by the commissioners does not amount to an imprisonment by them, till the warrant is in some way operative to the detention of the party, independently of the other process. But if the warrant operate to the confinement of the party within narrower bounds, it is an imprisonment by the commissioners. *Crowley v. Impey* and others, 2 Starkie, 261.

3. If, when a man is apprehended, and in the custody of officers of justice, a third person espouses his cause, and encourages the prisoner to resist, the officers may imprison such third person. *White v. Edmunds*, Peake, 89. When justified.

## INDEMNITY.

1. A note for a specific sum given for the maintenance of a bastard child, is a note of indemnity. Therefore, if no expense is incurred, no action thereon lies. *Wilde v. Griffin*, 5 Esp. C. 142. When a contract of indemnity exists.

2. If *A.*, in consideration of a premium, undertakes to insure *B.* against being drawn for the militia under a particular statute until a certain day, and represents that on that day all balloting under the statute will cease, and that *B.* will be completely secured by the insurance against the operation of the statute; *A.* is not thereby bound to indemnify *B.* in consequence of his being drawn for the militia under the statute, after the abovementioned day: but on account of the misrepresentation, the contract is void, and *B.* may recover back the premium as money had and received. *Duffel v. Wilson*, 1 Camp. 401.

3. A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party; an action of trover is afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages are recovered, and these, together with the costs, are paid by the bailiff: held, that there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain money had and received, to recover back the levy money paid over. *Wilson v. Milner*, 2 Camp. 452.

4. *A.* having paid to *B.* the whole of a demand claimed by *B.*, but part of which is due to *C.*, *B.* afterwards engages to indemnify *A.* against any claim by *C.*; this promise is supported by a sufficient consideration, although it was made after the payment of the money. *Lord Suffield v. Bruce*, 2 Starkie, 175.

5. In an action on a guarantee, the plaintiff gives in evidence a letter in the handwriting of the defendant, but without date, in which the latter states, "I have no objection to guarantee the payment of the rent as far as that of each quarter during Mr. *T. Want*'s continuance in possession." He also proves that *T. Want* rented certain premises

premises from him. This is not sufficient without showing that the plaintiff accepted the defendant's offer. *Symmons v. Want*, 2 Starkie, 371.

Construction  
of.

6. The recital in the condition of an indemnity bond, professing to state the agreement between the parties, does not confine the responsibility of the sureties to the limits therein specified. *Sansom v. Bell*, 2 Camp. 39.

7. An agent in this country for merchants, the sellers of goods in Russia, who guarantees, "that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that in default the consequence shall rest with the sellers," makes himself personally responsible to the buyer. An impediment arising from non-compliance with the navigation act, is an impediment within the terms of the guarantee. Such a guarantee is good within the statute of frauds, if the terms of the agreement can be collected from the written correspondence between the parties. In a declaration thereon, it need not be alleged, that an application for indemnity was made to the principals. *Redhead and another v. Cator*, 1 Starkie, 14.

Discharge of.

8. A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances showing that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor, in an action upon the bond under the plea of payment. *Plomer and others v. Long*, 1 Starkie, 154.

9. *A.* engages to indemnify *B.* against a debt due from *A.* and *B.* to *C.* of 50*l.* *A.* and *B.* in fact owe *C.* 74*l.*, and *C.* refuses to accept 50*l.* from *A.* without payment of the remainder of his debt, and *C.* arrests *B.* for the whole debt. *A.* is liable to *B.* on his engagement to indemnify him. *Hancock v. Clay*, 2 Starkie, 100.

10. A guarantee for the payment of goods supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. *Simmons and others v. Keating*, 2 Starkie, 426.

11. The neglect of the obligee to give notice to the surety, that the principal has made default, does not discharge such surety; but if the obligee (without the privity of the surety) enter into an engagement with the obligor, and deprive himself of the power of suing him, whereby the surety is prevented from coming into a court of equity for relief, he is then discharged, but not otherwise. *Orme v. Young*, 1 Holt, 84.

12. Though time given to the principal will, under certain circumstances, exonerate a surety; yet time given to a surety, without the privity of his co-surety, will not, upon his paying the debt, affect his right of action for contribution against such co-surety. *Dunn v. Slee*, 1 Holt, 399.

Its duration.

13. Where by a written guarantee, *A.* becomes bound to *B.* for any debt *C.* may contract with him not exceeding 100*l.*, the guarantee is not extinguished by one dealing between *B.* and *C.* to that amount, but extends to any debt of 100*l.* which *C.* may afterwards owe to *B.* *Merle v. Miles*, 2 Camp. 413.

14. A bond of indemnity given to the trustees of a public unincorporated insurance company, conditioned for the good conduct of a clerk while in the service of the said company, remains in full force during the period the clerk continues to serve the company, although there be changes among the individual members of whom the company is composed. *Metcalf v. Bruin*, 2 Camp. 422.

15. A

15. A guarantee for the payment of any goods to be supplied to a third person to a specified amount, remains in force, after goods to this amount have been supplied and regularly paid for, until the surety gives notice that he will be no longer responsible. *Mason v. Pritchard*, 2 Camp. 436.

16. If *A.* become bound to *B.* under condition that *C.* shall truly account to *B.* for all sums of money received by *C.* for *B.*'s use, and *C.* afterwards, with *B.*'s knowledge, take *D.* as his partner; the guarantee does not extend to sums of money received by *C.* for *B.*'s use after the formation of the partnership. *Bellairs v. Elsworth*, 3 Camp. 53.

17. An undertaking to be answerable to a given amount *for any goods supplied by A. to B.*, after goods to that amount have been supplied and paid for, still remains in force while *A.* supplies *B.* with goods on the same footing, until revoked by the surety. But as soon as *A.* alters the credit on which he supplied the goods to *B.*, the surety is discharged. *Baston v. Bennett*, 3 Camp. 220.

18. *A.* engages to guarantee the amount of goods supplied by *B.* to *C.*, provided eighteen months' credit be given; if *B.* give credit for twelve months only, he is not entitled, at the expiration of six months more, to call upon *A.* on his guarantee. But *B.* having, after the commencement of the action, delivered an invoice, from which it appears that credit was given for twelve months only, is at liberty to show, that this was a mistake, and that in fact eighteen months' credit was given. *Bacon v. Chesney*, 1 Starkie, 192.

## INDICTMENT.

1. Procuring a marriage between a man settled in one parish, and a woman, a pauper, settled in another, is not an indictable offence, provided the man is not actually chargeable to the parish at the time; therefore, in an indictment for such offence, the averment that he was a poor man, and unable to maintain himself and his family must be proved. *Rex v. Tanner and another*, 1 Esp. C. 307. Indictable offence.

2. An order of sessions is conclusive until reversed or quashed; therefore an indictment lies for disobeying it. *Rex v. Milton*, 3 Esp. C. 200. n.

3. Stealing oysters off oyster-lays in an arm of the sea, though brought there for sale, is a misdemeanor only by statute 31 Geo. 3. c. 51. *Rex v. Walford*, 5 Esp. C. 62.

4. It is criminal to obstruct custom-house officers in searching for smuggled goods if they are acting upon an information which affords a reasonable ground for search, though the information turn out to be unfounded. *Rex v. Akers*, 6 Esp. C. 125. n.

5. It is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he may be distinctly seen; although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. *Rex v. Crunden*, 2 Camp. 89.

6. An indictment will not lie for words spoken of a justice of the peace in his absence. *Rex v. Weltje*, 2 Camp. 142.

7. A conspiracy to obtain money by procuring from the Lords of the Treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. *Rex v. Pollman*, 2 Camp. 229.

8. If a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment and to receive the money. *Rex v. Pollman*, 2 Camp. 233.

9. If an overseer of the poor receive from the putative father of a bastard child, born within the parish, a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the Parish. *Rex v. Martin*, 2 Camp. 268.

10. Although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a pre-determined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are in point of law guilty of a riot. *Clifford v. Brandon*, 2 Camp. 358.

11. It is an indictable offence for stage-coaches to stand plying for passengers in the public streets. *Rex v. Cross*, 3 Camp. 224.

12. It is an indictable offence for a timber-merchant to cut logs of timber in the street adjoining his timber-yard; though he should not be able otherwise to get them into his premises, or to carry on his business there. *Rex v. Jones*, 3 Camp. 230.

13. It is an indictable offence fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, which he knows will not be paid. *Rex v. Jackson and another*, 3 Camp. 370.

14. If a baker mixes a perilous article, alum for instance, with his bread, himself or those he employs must use it, with such precautions as to render it harmless, since if the bread, through its use, is made noxious, he is indictable. *Rex v. John Dixon*, 3 M. & S. 11. S. C. 4 Camp. 12.

15. An indictment will not lie for a deceitful representation and warranty of the soundness of a horse. *Rex v. Pynell and others*, 1 Starkie, 402.

On statute.

16. To support an indictment on 42 G. 3. c. 107. for coursing deer in an inclosed ground, it is necessary, on the part of the prosecution, to call the owner of the deer to prove, that he did not give his consent to the prisoner to course them. *Rex v. Rogers*, 2 Camp. 654.

Pleadings.

17. Statute 26 Hen. 8. c. 6. authorizing the trial of felonies committed in Wales in the next adjoining English county, extends to felonies subsequently created. *Rex v. Windew*, 3 Camp. 78.

18. If a man writes a letter with intent to provoke a challenge, seals it up and puts it into the post-office in Westminster, addressed to a person in the city of London, who receives it there, the writer may be indicted for this offence in the county of Middlesex. *Rex v. Williams*, 2 Camp. 506.

19. *Quære*, whether it be now necessary in an indictment for felony to lay a parish within the county? *Rex v. Phillips*, 3 Camp. 77.

20. In an indictment consisting of several counts, the charge in each count must be complete in itself without reference to the others. *Rex v. Kelly and others*, 3 Esp. C. 28.

21. There

21. There is no objection of any sort to trying a man upon one indictment; for several distinct misdemeanors of the same nature. *Rex v. Jones*, 2 Camp. 131.

22. A woman tried on the coroner's inquest for the murder of her bastard child, may be found guilty under 43 Geo. 3. c. 58. s. 4. of endeavouring to conceal the birth. *Rex v. Mary Cole*, 3 Camp. 371. Conviction of lesser offence.

23. An indictment against a master for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, must allege that the servant was of tender years, and under the dominion and control of the master. *Rex v. Ridley*, 2 Camp. 650.

24. Form of an indictment against workmen for a conspiracy against their employers. *Rex v. Ferguson and Edge*, 2 Starkie, 489.

25. The statute 5 & 6 W. & M. c. 11. s. 3. giving the prosecutor of an indictment costs in certain cases, only applies to indictments under that statute. *Rex v. Doyle*, 1 Esp. N. P. C. 126. Costs.

26. The judge cannot certify for the costs of a special jury in criminal prosecutions. *Rex v. Abingdon*, 1 Esp. C. 229. Practice.

27. In criminal prosecutions unless by the attorney-general, the counsel for the crown has no right to reply where the defendant does not call witnesses. *Rex v. Lord Abingdon*, 1 Esp. C. 226.: Peake, 236.

## INFANT.

1. Since the law will not allow an infant to trade, his trading contract is void. *Dilk v. Keighley*, 2 Esp. C. 480. Contract by.

2. An infant cannot accept a bill of exchange for necessaries. *Williamson v. Watts*, 1 Camp. 552.

3. Infancy is a good defence to an action on the warranty of a horse. *Howlett v. Haswell*, 4 Camp. 118.

4. Contracts are governed by the law of that country in which they are concluded, therefore unless infancy is by the law of Scotland a defence to a contract made there, it is none in our courts; and if the defendant insists that it is, he must prove the law. *Male v. Roberts*, 3 Esp. C. 163.

5. A promise by an adult to pay, when he is able, a debt contracted during infancy, is conditional; therefore, on suing him, the plaintiff must prove his ability, which, however, may be inferred from appearances. *Cole v. Saxby*, 3 Esp. C. 159.

6. That the voidable contract of an infant may be ratified by a promise after coming of age, the promise must be express. *Thrupp v. Fielder*, 2 Esp. C. 628.

7. A ratification by an infant when of age, under the terrors of an arrest or ignorance that he is discharged by law, is not binding. *Harmer v. Killing*, 5 Esp. C. 102.

8. If goods are delivered to a carrier by the vendor, addressed to the purchaser, while the latter is under the age of twenty-one, but they do not reach him till he has attained that age, infancy is a good defence to an action brought against him for the price of the goods. *Griffin v. Langfield and wife*, 3 Camp. 254.

9. A person is liable as acceptor of a bill of exchange, which was drawn while he was an infant, but was accepted by him after he came of age. *Stevens v. Jackson and another*, 4 Camp. 164.

10. A bill drawn and indorsed by an infant is available by the indorsee against the acceptor. *Taylor v. Croker*, 4 Esp. C. 187.

11. If an adult and infant are sued jointly, the plaintiff cannot enter a *nolle prosequi* as to the infant on his pleading nonage; but must discontinue, and commence *de novo* against the adult alone. *Jaffray v. Frebain and others*, 5 Esp. C. 47.

12. Where an infant and an adult join in a contract, voidable by the infant, the adult may be sued alone; and if the nonjoinder of the infant is pleaded in abatement, the plaintiff may (must, see 3 Taun. 307.) reply his nonage. *Chandler v. Parkes and another*, 3 Esp. C. 76.

Compromise.

13. Where lands descended to an infant with respect to whom the tenant in possession was a trespasser, and an ejectment was brought by the infant and compromised by his attorney; although after the infant was of age he accepted no rent from the tenant, nor in any wise confirmed the agreement which his attorney had entered into, it was held that he could not then maintain a second ejectment, without a regular notice to quit, provided there was no fraud nor collusion in the first instance; because the compromise having been entered into for his benefit, he ought to be bound by it. *Doe ex dem. Miller v. Noden*, 2 Esp. Cas. 530.

Necessaries.

14. It is incumbent on a tradesman before he trusts an infant with what may appear necessaries, to enquire whether he is provided by his friends. *Ford v. Fothergill, Peake*, 229.

15. The question what are necessaries, depends, not upon the infant's appearance in life, but his real circumstances. *Ford v. Fothergill*, 1 Esp. N. P. C. 211.

16. An infant is liable for money paid to discharge him out of custody on a demand which he could not dispute; but the proof that he could not dispute it lies upon the lender. *Clarke v. Leslie*, 5 Esp. C. 28.

17. Regimentals furnished to an infant, a member of a volunteer corps, are necessaries. *Coats v. Wilson*, 5 Esp. C. 152.

18. Where a minor orders articles which are necessary and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given to that effect by the father. *Baker v. Keen*, 2 Starkie, 501.

19. A lieutenant in the royal navy, under the age of 21, is not answerable for the price of a chronometer, in an action to which he has pleaded his infancy, and the replication is, necessaries. *Beralles v. Ramsay*, 1 Holt, 77.

Embezzlement by.

20. An infant (here an apprentice) is liable for money embezzled, and by action in form either *ex contractu* or *ex delicto*. *Bristow and another v. Eastman*, 1 Esp. N. P. C. 172. *Peake*, 223.

Guardian.

21. Where an infant prosecutes or defends by guardian, the guardian is liable as well for the attorney's bill as for the costs of the opposite party succeeding, unless he lent his name conditionally, or through imposition. *Marnell v. Pickmore*, 2 Esp. C. 473.

## INHABITANCY.

What is.

Occasional residence on a tenement held by the party, is sufficient inhabitance within a custom. *Fitch v. Fitch*, 2 Esp. C. 543.

INN

## INN OF COURT.

1. An action at law may be maintained upon the bond usually given to the society of *Lincoln's Inn*, on being called to the bar, to recovers arrears of "absent commons," "vacation commons," "preacher's duties," and "pensions," which have accrued while the party has remained a member of the society, although he has not lived in the inn or practised at the bar. *Lord Rosslyn and another v. Jodrell*, 4 Camp. 303.; S. C. 1 Starkie, 148. Bond.
2. Persons required to take out certificates under the 55 of Geo. 3. c. 184. (schedule A. part 1. title certificate) are only persons being members of the four inns, of court, &c. *Edgar v. Hunter*, 1 Holt, 528. Certificate to practice.

## INNKEEPER.

1. If a guest at an inn deposit his goods in a room which he uses as a warehouse, and of which he has the *exclusive possession*, the innkeeper is not liable for the loss. *Farmworth and another v. Packwood*, 1 Starkie, 249.; S. C. 1 Holt, 209. Liability of.
2. The master of an hotel is not liable to pay for the washing of the linen of the guests at his house. *Collard v. White*, 1 Starkie, 171.
3. An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest. *Dicas v. Hides*, 1 Starkie, 247.; S. C. 1 Holt, 207. Obligation to furnish post-horses.

## INSOLVENT.

1. After the 1st day of February, 1809, a promissory note was given for an antecedent debt: Held, that as against the payee, the maker would have been discharged under the insolvent debtors act, 49 Geo. 3. c. 115.; but that he was not, as against a person to whom the note was subsequently indorsed. *Lucas v. Winton*, 2 Camp. 443. Discharge of.
2. Where a debtor is discharged under an insolvent act, his property is vested in the clerk of the peace, until assignees are chosen, and afterwards in his assignees; and although he be permitted to continue in the possession of his property, and to act as ostensible owner, no creditor can take his goods in execution, and compel the sheriff to make a sale. His remedy is to obtain a distribution under the act; or, in case of fraud, to apply to have the discharge set aside. *Kindle v. Bell*. 1 Holt, 161. Property.
3. The creditors of a deceased insolvent may be compelled to submit to rateable distribution of his effects. *Brady v. Sheil*, 1 Camp. 147. Deceased.
4. Where at a meeting of the creditors of a deceased insolvent, called by his executor, they agree to a rateable distribution, on the faith of which he executes a deed of assignment of all the assets which have come to his hands, for the benefit of the creditors; one of them cannot afterwards refuse to come in under the deed, and bring an action for his debt against the executor. *Brady v. Sheil*, 1 Camp. 147.

INSUR-



## INSURANCE. — MARINE.

Subjects of.

1. An executor in trust has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator. *Tidswell v. Ankerstein, Peake, 151.*

2. A party not registered as the owner of a vessel has not an insurable interest. *Marsh v. Robinson, 4 Esp. C. 98.*; but see 3 *Camp. 242.*; 2 *Taunt. 5.*

3. The insurance of neutral property is good against a capture by a British ship, though pronounced just by the Court of Admiralty, if the property, instead of being condemned is ordered to be restored. *Visger v. Prescott, 5 Esp. C. 184.*

4. *A.*, resident in *Dublin*, having agreed with *B.* and *C.* at *Jamaica* to send out two ships annually, for which they were to provide cargoes, to be consigned to him, chartered a ship which was to proceed from *Bristol* to *St. Thomas's*, where she was to deliver an outward cargo, (the property of another person), and from thence to *Jamaica*, where she was to take in a cargo from *B.* and *C.* for *Dublin*; and by the terms of the charter-party, *A.*, in consideration of guaranteeing the homeward cargo, was to receive a commission of  $2\frac{1}{2}$  per cent. upon the homeward freight. The ship was captured on her passage from *St. Thomas's* to *Jamaica*. Held, that *A.* had not then an insurable interest either in the commission on the freight, or in the commission on the sale of the homeward cargo. *Knox v. Wood, 1 Camp. 543.*

5. The captors of property in a conjunct expedition by the navy and army against a fortress on the land, since 45 Geo. 3. c. 72., have an insurable interest before condemnation. *Stirling v. Vaughan, 2 Camp. 225.*

6. A policy of insurance is not vitiated by giving leave to the ship to proceed to any port in a particular sea in which there are both hostile and neutral ports, unless it can be shown that it was intended the ship should in fact proceed to one of the former. *Muller v. Thompson, 2 Camp. 610.*

7. Where it is stipulated by a charter-party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage. *Hobbs v. Hannam, 3 Camp. 93.*

8. Expected profits may be insured by an open policy. *Eyre and another v. Glover, 3 Camp. 276.*

Form of.

9. The slip upon which underwriters enter the risks they insure is not an instrument binding between the parties. *Rogers v. McCarthy, 3 Esp. C. 106.*

10. In a policy of insurance, the persons interested were denominated "the trustees of Messrs. K. F. and Co." Held, that this might be considered their usual style and form of dealing, within statute 28 Geo. 3. c. 56. s. 1. *Hibbert v. Martin, 1. Camp. 538.*

Construction.

11. The loss of a ship from worms eating the planks, is not a loss by perils of the sea, within the meaning of a policy. *Rohl v. Parr, 1 Esp. C. 445.*

12. The loss of goods from the ship's running foul of another, is a loss by "perils of the sea," within the meaning of a charter-party. *Buller and others v. Fisher and others, 3 Esp. C. 67.*

13. A

13. A loss arising from rats eating holes in the ship's bottom, is not within the perils insured against by the common form of a policy of insurance. *Hunter v. Potts*, 4 Camp. 205.

14. One English ship fires at and sinks another, under the mistaken notion that she is a French privateer; this is not a loss by the perils of the seas. *Cullen v. Butler*, 4 Camp. 289.; S. C. 1 Starkie, 138.

15. A merchant-ship (under a mistake) is taken in tow by a British ship of war, and is thereby exposed to a tempestuous sea, which injures goods on board of her; this is a loss from the perils of the sea: but, *semble*, since the loss resulted from restraint by a ship of war, it might have been alleged to have been occasioned by capture and detention. *Hagedorn and another v. Whitmore*, 1 Starkie, 157.

16. If a chartered ship be lost by means of the captain engaging in an illegal trade, in obedience to the orders of the charterer, this is not a loss by barratry for which the owner of the ship can recover against the underwriters. *Hobbs v. Hannam*, 3 Camp. 94.

17. Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown, that he acted against his own judgment. *Todd and others v. Ritchie*, 1 Starkie, 240.

18. If a ship be driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture, and not by the perils of the seas. *Green v. Elmslie, Peake*, 212.

19. If the captain of a ship insured burn her, to prevent her from falling into the hands of the enemy, this is a loss by fire within the meaning of the policy. *Gordon v. Remington*, 1 Camp. 423.

20. If a policy be on a ship bound to a foreign port, until she is twenty-four hours moored in safety there; and previous to such ship's arrival at her destined port, an embargo is laid on all English vessels in that port, and she, on entering it, is also detained, and her crew made prisoners of war, — the assured is entitled to recover. *Minett v. Anderson, Peake*, 211.

21. A warranty in a policy of insurance against capture in port does not protect the underwriter from a loss happening by capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. Therefore, where a ship insured from *Rotterdam to London*, and "warranted free from capture in port," was captured while lying at anchor near *Ghoree* in the *River Macs*, the underwriters were held liable. *Baring v. Vaux*, 2 Camp. 541,

22. Where goods insured were warranted free from seizure in the port of discharge, the captain having arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor, and made a signal for a pilot; a pilot-boat in consequence came out, with doucanniers on board, who carried him into the harbour, where the cargo was seized and condemned. Held, that this was a seizure on her port of discharge within the meaning of the warranty. *Oom v. Taylor*, 3 Camp. 204.

23. If goods insured are warranted free from capture and seizure, in the port of discharge, and the goods being destined to *Pillau*, are seized while the ship is lying at anchor in *Pillau Roads*; this is a seizure in the port of discharge within the meaning of the warranty. *Mayhew v. Scott*, 3 Camp. 205.

24. A vessel under a policy with leave to touch at any port in the course of her voyage, cannot break bulk on touching.

ing. *Still v. Wardell*, 2 Esp. C. 610. But see *Raine v. Bell*, 9 East, 195.

25. *Semble*, that a policy to any of the windward or leeward islands must be confined to those only to which the ship may lawfully trade, and not extended to others in possession of the enemy, but which it was expected, would be captured. *Neilson v. De Lacour*, 2 Esp. C. 619.

26. Where by a memorandum on a policy, the underwriter is to adjust the loss within a specified time after notice, it is sufficient notice that he has information of the loss, though not from the assured. *Abel v. Potts*, 3 Esp. C. 242.

27. A policy on ship "with liberty to touch and discharge goods at X." does not authorize her taking in cargo there, though whilst waiting for convoy. *Sheriff v. Potts*, 5 Esp. C. 96.

28. Leave granted in a policy of insurance on a fishing voyage to see prizes into port, does not authorize the ship to remain in a port till a prize receives necessary repairs, which she could not otherwise have had; and at most extends to seeing the prize moored safely, and giving the necessary orders for her final destination. *Jarratt v. Ward*, 1 Camp. 263.

29. Where there is a policy on goods, as may be thereafter declared and valued, the declaration of interest to be available must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss: but the declaration of interest is not a condition precedent, and if none is made, the policy is then open instead of being valued; and upon proof of interest at the trial the assured will be entitled to recover. *Harman v. Kingston*, 3 Camp. 150.

30. Policy on goods "at and from *Gottenburg* to any part of the *Baltic*, beginning the adventure from the loading thereof," but declared to be in continuation of other specified policies. These were on the same goods, "and from *Norfolk* in *Virginia*;" where, in point of fact, the goods were loaded. Held, that under these circumstances, it was no defence to the underwriters on the first-mentioned policy, that the goods were not loaded at *Gottenburg*. *Bell and others v. Hobson*, 3 Camp. 272.

31. A policy of insurance "at and from *London* to *Berbice*," was effected upon the receipt of a letter from the captain (which was shown to the underwriters,) stating that he had passed *Barbadoes*; and the words "at sea" were inserted in the policy, after the printed clause describing the beginning of the adventure on the goods. Held, notwithstanding, that the policy was vacated by a deviation at *Madeira*, in a former part of the voyage. *Redman v. London*, 3 Camp. 503.; S. C. 5 Taun. 462.

32. A policy in the common form upon goods to the *East Indies*, ceases when the ship has delivered the company's outward cargo at a port in the *East Indies*, and will not protect the goods to a market in an intermediate voyage, made by the ship before her final departure for *Europe*. *Richardson v. London Assurance Company*, 4 Camp. 94.

33. Policy on ship "at and from *Antigua* to *England*, with liberty to touch at all or any of the *West India* islands, *Jamaica* included." Held, that the ship under the protection of this policy, might touch at any of the *West India* islands, although not in the direct course from *Antigua* to *England*, and stay at such as she visited the time necessary

necessary to complete her homeward cargo. *Metcalf v. Parry*, 4 Camp. 123.

34. An underwriter is bound from the signing of the memorandum, though the policy is not actually signed until afterwards. *Thompson v. Donaldson*, 3 Esp. C. 63. Commence-  
ment of.

35. The owner of a ship sent her to *St. Domingo*, with a cargo to be bartered for goods there, which she was to bring back to *England*. When a small part of the outward cargo had been unloaded, and bartered for goods which were put on board, the ship was lost; but the remainder of the outward cargo was saved, and bartered for other goods, which would have formed a sufficient cargo for the ship, if she could have performed the homeward voyage. Held, that the underwriters, on a policy on the ship's freight, at and from *St. Domingo*, were only liable for the freight of the homeward goods that were on board when the ship perished. *Forbes v. Cowie*, 1 Camp. 520.

36. Policy at and from the island of *St. Michael*; the ship arrived there in a very disabled state, and after lying at anchor above twenty-four hours in great danger from a storm, was blown out to sea and wrecked. Held, that the policy on the homeward voyage never attached. *Parmater v. Cousins*, 2 Camp. 235.

37. Policy "at and from *Sheerness* in ballast to *Charente*, and back to a port in the *British* channel and *London*; from the date thereof, till the ship should be arrived at *Charente*, and back to a port in the channel and *London*; on freight valued at the sum insured, to be deemed interest in the outward voyage, although in ballast." The ship was freighted for the voyage in question by a charter-party, whereby she was to proceed to *Charente* in ballast, and there the freighter was to provide her with a full cargo of brandy. On the arrival of the ship at *Charente*, she was put under an embargo; and after being so kept for six months, she was seized and condemned by the *French* government. Held, that the freight was protected by the policy while the ship lay at *Charente*, before any goods were put on board, and that the underwriters were liable for a loss so happening. *Mackenzie v. Shedden*, 2 Camp. 431.

38. Policy at and from *Riga* to the United Kingdom, on ship and freight, declared to be in continuation of two other policies, which were on ship and freight on a voyage from the United Kingdom to the ship's port of discharge in the *Baltic*, during her stay there, and from thence back to her port of discharge in the United Kingdom. The ship was seized and condemned at *Riga*, before she had discharged her outward cargo. Held, that the first policy could not be applied to the outward freight. *Ball v. Bell*, 2 Camp. 475.

39. A policy at and from a foreign port attaches when the ship has arrived there in good physical safety, although, from political causes, she may be in danger of condemnation. *Bell v. Bell*, 2 Camp. 475.

40. Policy on goods "at and from the ship's loading port or ports in *Amelia Island* to *London*." The ship never touched at *Amelia Island*, but took her cargo at *Tigre Island*, which lies a little farther up the river *St. Mary's*. Held, that the policy nevertheless attached, this being the usual mode in which ships in that trade take in their cargoes. *Moxon v. Atkins*, 3 Camp. 200.

41. It seems that a policy of insurance, at and from *Gibraltar*, will attach, if the ship enters *Gibraltar* bay, although she does not actually touch at the garrison. *Park v. Hamond*, 4 Camp. 344.; *S. C.* 1 Holt, 80.

42. Where

Duration of.

42. Where the same person insures both ship and cargo to a particular port, and until moored 24 hours in safety; by the ship voluntarily touching and remaining 24 hours at another port, the policy is discharged. *Secus*, as to the policy on goods, where the insurance on the two is by separate persons. *Leigh v. Mather*, 1 Esp. C. 413.

43. If a ship insured to a particular port is forced into another by stress of weather, where she discharges part of her cargo, she is nevertheless covered by the policy until she reaches her port of discharge. *Aliter*, where she seeks the port voluntarily, though even she is covered for 24 hours after mooring, under the common policy. *Leigh v. Mather*, 1 Esp. C. 413.

44. A delivery on board a private lighter (employed by the consignees), discharges the underwriter from a policy on the goods "until safely landed:" *secus*, where delivered to a public lighter, entered at Waterman's Hall. *Hurry and another v. the Royal Exchange Assurance Company*, 3 Esp. C. 289.; S. C. 2 B. & P. 430.

45. A policy on a ship at and from a place, is not abandoned by a delay in sailing, if capable of explanation. *Grant v. King*, 4 Esp. C. 175.

46. A ship insured for a certain time whilst in harbour securely moored, may change her moorings. ——— v. *Westmore*, 6 Esp. C. 109.

47. If a ship is justly seized as forfeited for smuggling, and afterwards restored, the underwriters are not liable for any damage happening to the ship by the perils of the sea, in the interval between the seizure and restoration. *Pipon v. Cope*, 1 Camp. 434.

48. If a ship with goods on board, insured to a foreign port, learning in the course of her voyage that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can till the embargo is removed, the goods will in the mean time be protected by the policy, while the voyage remains legal: but if she might, upon such an occasion, put into a friendly port adjoining to her port of destination, and instead of doing so, she sails back for her port of outfit, and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged. *Blackenhagen v. The London Insurance Company*, 1 Camp. 454.

49. If a ship insured, on arriving off her port of destination is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the *English* commander there, the policy does not remain in force till she reaches a port. *Parkin v. Tunno*, 2-Camp. 59.

50. Goods insured to *A.*, that port being in the hands of the enemy, are carried to *B.*, and afterwards to *C.*, their condition being here inspected for the first time from the original sailing of the ship, they are found to be almost entirely destroyed by sea damage, which might have happened partly on the voyage to *A.* or entirely in passing from *A.* to *C.*; the underwriters are not liable for any part of this loss, there being no distinct evidence that the goods were insured while they were protected by the policy. 2 Camp. 59.

51. If by a policy of insurance the ship is warranted "free of capture and seizure in her port or ports of discharge," and she is taken in an open river not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner; the place where she is taken is to be considered her port of discharge within the meaning of the policy, and the underwriters are not liable for the loss. *Jarman v. Coape*, 2 Camp. 613.

52. Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at that port; although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees. *Brown v. Carstairs*, 3 Camp. 161.

53. Where a policy of insurance contains a warranty against seizure in port; if the ship, to avoid such seizure, went to sea before she is properly loaded, and is in consequence obliged to go to a port out of the course of the voyage insured, the underwriters are not liable for a subsequent loss. *O'Reilly and others v. Royal Exchange Insurance Company*, 4 Camp. 246.

54. Where a policy of insurance contains no warranty against seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. *O'Reilly and others v. Goune*; 4 Camp. 249.

55. Where abandonment is requisite to a total loss, it must be made by the assured immediately on his receiving intelligence. *Able v. Potts*, 3 Esp. C. 242. Abandonment.

56. The assured on goods consigned to a particular port is not entitled to abandon, when, on reaching the port, it is occupied by the enemy. *Lubbock v. Rowcroft*, 5 Esp. C. 50.

57. There must be an abandonment of freight where the goods specifically exist, although the ship is incapable of prosecuting the voyage. 1 Camp. 541.

58. If an insurance broker requires the underwriters upon a policy to settle as for a total loss, and to give directions for the disposition of the property insured, this does not amount to an abandonment. *Parmater v. Jodhunter*, 1 Camp. 541.

59. If the owner of a ship insured hears that she is captured, and thereupon give notice of abandonment to the underwriters, the abandonment stands good, and he may proceed as for a total loss, if she was actually once captured, although he knows of her being recaptured before action brought. *Bainbridge v. Neilson*, 1 Camp. 237.

60. The owner of a cargo of flax-seed insured "at and from *America to Limerick*," himself residing at that place, on the 11th of *February*, 1808, received information that the ship, with the flax-seed on board, had been detained at *Philadelphia* by the *American* embargo; but did not give notice of abandonment till the 11th of *June* following. The flax-seed was intended for sowing, and might have been employed for that purpose, had it arrived before the 10th of *May*, but afterwards would have been scarcely of any value. Held, that however the plaintiff might have waited till the 10th of *May* before abandoning, the abandonment on the 11th of *June* was out of time. *Kelly v. Walton*, 2 Camp. 155.

61. An insured vessel arrives at the port of *Kinsale*, on the 24th of *November*; on the 14th *December* a second survey is had, when it is found that the expences of the repairs will exceed the value of the ship: notice of abandonment to the insurers in *London* on the 6th of *January* is too late. *Aldridge v. Bell*, 1 Starkie, 498.

62. If a ship, for which the underwriters (when a demand is made upon the policy) have paid as for a lost ship, should chance to turn up, she is to be considered as abandoned, and will belong to the underwriters. *Houstman v. Thornton*, 1 Holt, 242.

63. A

63. A vessel is driven into a port where there is no dock to receive her: it appeared that she had suffered so much by sea perils that, upon examination and survey, it was judged expedient to break her up, and to sell her for old timber. Held, in an action on the policy, that the assured was bound to abandon before he could call upon the underwriters for a total loss; the ship not being a *wreck*, but, however maimed and damaged, existing in *specie* as a ship. *Bell and others v. Mixon*, 1 Holt, 423.

## Adjustment.

64. An adjustment on a policy is conclusive, unless there has been fraud, mistake of law; or of fact. *Christian v. Coombe*, 2 Esp. C. 489.

65. An adjustment is not conclusive against the underwriter, as where made under a mutual error. *Sheriff v. Potts*, 5 Esp. C. 96.

66. An underwriter who, upon a full disclosure of facts, has signed his initials to an adjustment on the policy without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances with which he had been made acquainted, before signing the adjustment. *Harbert v. Champion*, 1 Camp. 134.

67. An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged. *Shepherd v. Chewter*, 1 Camp. 274.

68. After a total loss and adjustment within a month, and whilst the policy remains in the hands of the broker, the initials of the insurer are struck out of the adjustment to indicate payment, and the broker debits the insurer; he is still liable to the assured. *Fell v. Pratt*, 2 Starkie, 67.

69. Where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure. *May and others v. Christie*, 1 Holt, 67.

## Agency.

70. An insurer who desires the assured to do what he conceives to be the best under the circumstances, is bound by what the latter does in the exercise of a sound discretion. *Hagedova v. Whitmore*, 1 Starkie, 157.

## Alteration.

71. If a policy of insurance is altered as to the subject matter insured, after the risk has attached, without having been re-stamped, it is not only void as altered, but it is completely vitiated, and ceases to be available to any legal purpose. *French v. Patten*, 1 Camp. 72., 180. b.

72. A policy "at and from A. and B.," is not vitiated by inserting, without the consent of the underwriters, the words, "both or either." *Clapham and another v. Cologan*, 3 Camp. 382.

73. A policy of insurance containing a warranty that the ship shall sail on or before a given day, may be altered pending the risk, by a memorandum, whereby the underwriters, in consideration of a further premium, agree to cancel the warranty, and to make a return of premium, if the ship sail with convoy. *Ridsdale and others v. Shedden*, 4 Camp. 107.

74. A policy of insurance from *Calmar* to *Portsmouth*, is altered with the consent of some of the underwriters, by inserting the words "or *Weymouth*" after *Portsmouth*, the plaintiff cannot recover on the altered policy against an underwriter who was ignorant of the alteration when it was made; even although, upon being informed of the alteration, he said that he would not take advantage of it. *Campbell v. Christie*, 2 Starkie, 64.

75. Where

75. A policy of insurance is altered by striking out the words in the body of the policy, which contained a warranty to sail at a certain time and inserting a memorandum of an enlarged time in the margin. Some of the underwriters consented to the alteration; but the defendant did not consent. In an action upon this policy, held that the alteration did not avoid the policy. *Fairlie v. Christie*, 1 Holt, 331.

76. Where separate articles are jointly insured, upon some alone of which the insurance attaches, the assured is only entitled to recover such a proportion of the sum underwritten as the property upon which the policy attached bore to the whole. *Amery v. Rogers*, 1 Esp. N.P.C. 207. Apportionment.

77. Held that the underwriters on goods insured from London to Demarara, were only liable to an average loss, where the ship, being captured and recaptured, was sent into St. Thomas's strip of all her hands, and the captain not being able, on his arrival there, to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship and cargo, and broke up the adventure. *Underwood v. Robertson*, 4 Camp. 138. Average loss.

78. Insurance on freight on a voyage from *A.* to *B.*, a second insurance on freight valued at 10,000*l.* on a voyage from *A.* to *B.*, and thence to *C.*, with a memorandum that if the ship be lost at *B.*, a settlement should be made as if she had on board an entire freight to *C.* The ship earns freight to the amount of 2500*l.* on her voyage from *A.* to *B.*, and is lost at *B.*, the assured cannot recover for a greater loss than 7500*l.* *Robertson v. Majoribanks*, 2 Starkie, 573.

79. An action lies by the underwriter having paid the loss against the captain for barratry. *Bird v. Thompson*, 1 Esp. C. 339. Barratry.

80. If a broker, authorized to advertise a ship as a general ship to a particular port, in his advertisement warrants that she shall sail with convoy, though contrary to his directions, the warranty binds the owner. *Rinquist v. Ditchell*, 3 Esp. C. 64.; *S. C. Abbott on Shipp.* Part 2. c. 2, 8. Broker.

81. If a merchant orders an insurance broker to effect a policy of insurance for him on a cargo of corn, without giving any directions as to those with whom the policy is to be effected, and the insurance broker effects the policy with one of the chartered companies, by whose policies corn is warranted against partial losses although the ship be stranded; upon this cargo after a stranding of the ship, the merchant cannot maintain an action against the insurance broker for not effecting the policy with private underwriters, who, by the common form of a policy of insurance, would have been liable for this partial loss. *Comber v. Anderson*, 1 Camp. 523.

82. Although an insurance broker is bound to obey the positive directions of the assured to abandon, yet if it is referred to his discretion, whether to abandon or not, and he acts *bona fide*, he is not liable to an action for neglecting to abandon. *Comber v. Anderson*, 1 Camp. 525.

83. If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it. *Bousfield v. Creswell*, 2 Camp. 545.

84. If an insurance broker living at a distance from his principal, upon a loss happening, gives him credit in account for the money due from the underwriters, he cannot a considerable time after, make a demand upon him for the amount of the sums subscribed by several  
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of the underwriters who have become insolvent without paying. *Jameson v. Swainstone*, 2 Camp. 546. n.

85. The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, till such time as they have actually subscribed the policy, and if the broker having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to these terms, and afterwards effects the policy and pays premiums to the underwriters, he can maintain no action against his principals for commission or money paid. *Warwick v. Slade*, 3 Camp. 127.

86. As soon as an insurance broker has received credit in account with an underwriter for a loss upon his policy, his principal may maintain money had and received against him to recover the amount, and in such action, if the underwriter's name is erased from the policy, the defendant can neither dispute the liability of the underwriter for the loss nor his own receipt of the sum subscribed. *Andrew v. Robinson*, 3 Camp. 199.

87. Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out, upon his signing the adjustment; he gave them credit in his books for the loss, and became bankrupt; but they never took credit for the amount in their books: on the contrary, they gave the assured notice of the bankruptcy, and there was afterwards a settlement of accounts between the brokers and the assured, comprehending the policy in question, in which no demand was made upon them in respect of the bankrupt's subscription. Ruled, that they were not liable to the assured for the sum due from the bankrupt on the policy. *Ovington v. Bell and another*, 3 Camp. 237.

88. Where a ship was condemned for carrying simulated papers, and the policy containing no liberty to do so, the assured could not recover upon it: held, that an action could not be maintained against the insurance brokers for having neglected the premiums and duties, contrary to the instructions given them for effecting the policy, as in the result the assured were not damnified by this neglect. *Fomin v. Oswell and another*, 3 Camp. 357.

89. Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instructions given to them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage. *Fomin v. Oswell and another*, 3 Camp. 357.

90. Insurance brokers were ordered to effect a policy "at and from Teneriffe to London." Held that they were liable for not inserting in it a liberty "to touch and stay at all or any of the Canary Islands," that being usually inserted in policies from Teneriffe. *Mal-lough v. Barber and others*, 4 Camp. 150.

91. Insurance brokers holding a policy on which a loss has happened, come to a general settlement of their account with one of the underwriters, including his subscription to this policy, and for the balance found due, which was rather less than the amount, take a bill of exchange from him at three months, but without erasing his name from the policy: this bill they retain in their own possession, and on the underwriter's becoming bankrupt, prove it upon his estate as a debt due to themselves. Held, that under these circumstances, they were liable to the assured for the amount of the subscription. *Wilkinson v. Clay and another*, 4 Camp. 171.

92. In an action for premiums of insurance by the executors of an underwriter against an insurance broker, he cannot set off, or deduct returns of premiums which accrued after the death of the testator. *Houstoun and others v. Robertson*, 4 Camp. 342.; S. C. 1 Holt, 88.

93. Where an insurance broker, when instructed to effect a policy on goods, is informed that they were loaded at a prior port to that from which the risk is to commence, he is liable to an action for negligence, if he effects the policy in the common form, "beginning the adventure upon the said goods from the loading thereof aboard the said ship." *Park v. Hamond*, 4 Camp. 344.; S. C. 1 Holt, 80.

94. Where A. at *Malaga*, directs by letter his broker in *London* to insure 1000*l.* on goods shipped on board the *Pearl* from *Gibraltar* to *Dublin*; and in the conclusion of his letter adds, "I take the risk on myself from this [*Malaga*] to *Gibraltar* bay, where I shall send my letters on shore." Held that the broker was liable to an action for negligence, in not stating in the policy that the goods were loaded at *Malaga*. *Park v. Hamond*, 1 Holt, p. 80.

95. An insurance broker is *not* entitled, upon the ground of any usage of trade, to a commission of twelve per cent. on the balances which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a *gratuity* merely, and not of right. Nor can it be claimed, but upon the footing of contract, either express or implied, between the parties. *Levi and others v. Barnes*, 1 Holt, 412.

96. A concealment of the time of sailing, and of the fact of the arrival of a vessel which left with the one insured is material. *M'Andrew v. Bell*, 1 Esp. C. 373.; *Webster and another v. Foster*, Id. 407. Concealment.

97. It is unnecessary to disclose to the underwriter the former accidents which had befallen the ship; all that is requisite is that he be made acquainted with her state at the time of insurance. *Freeland and others v. Glover*, 6 Esp. C. 14.

98. If the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her, at and from the foreign port to a port in *England*; unless information on the subject be particularly called for. *Beckwith v. Sydebotham*, 1 Camp. 116.

99. According to the usage of the *Newfoundland* trade, when ships arrive on the coast they are either employed for some time in fishing (called banking), or they make an intermediate voyage in the *American* seas, before beginning to take their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy, "lost or not lost at and from *Newfoundland* to a port in *Europe*," although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. If the usage is general, it makes no difference for this purpose, that it is not uniform. *Vallance v. Dewar*, 1 Camp. 503.

100. Nor where the ship is to take an intermediate voyage, is it necessary to disclose this to the underwriters. *Ougier v. Jennings*, 1 Camp. 505. n.

101. So, the usage being for ships to load a part of their cargo withoutside the bar of *Oporto*, a ship insured at and from that place may do so, without leave being given by the policy, or any disclosure being made upon the subject. *Kingston v. Knibbs*, 1 Camp. 508. n.

102. The assured on a policy at and from *Riga*, are in possession of a letter from their correspondent there, stating that an order for sending the papers of all ships arriving at that port to *Petersburgh* had produced a great sensation, intimating that the papers of the ship insured had been sent to *Petersburgh* accordingly, and expressing considerable apprehensions for her safety. This letter is not communicated to the underwriters, but the broker informs them of the fact of the ship's papers being sent to *Petersburgh*. Held, that the policy was not vitiated on the ground of concealment by the non-communication of the letter. *Bell v. Bell*, 2 Camp. 479.

103. Policy "on forty carboys of vitriol," they were carefully stowed on deck; but caught fire, and were necessarily thrown overboard during the voyage: carboys of vitriol are sometimes stowed on the deck, and sometimes bedded in sand in the hold, where they are considered safer. Held that the underwriters in this case were liable, although there was no communication to them that the carboys were to be stowed on deck. *Da Costa v. Edmunds*, 4 Camp. 142.

104. It is the duty of the assured, not only to communicate to the underwriter articles of intelligence which may affect his choice whether he will insure at all, and at what premium he will insure, but likewise all rumours and reports which may tend to enhance the magnitude of the risk. *Durrell and another v. Bedesly*, 1 Holt, 283.

105. In effecting a policy of insurance, a circumstance of intelligence, inserted in Lloyd's lists need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to be taken into account. *Friere v. Woodhouse*, 1 Holt, 572.

#### Damages.

106. In the case of foreign insurance, the rate of exchange when the underwriters are called upon, is the standard of payment. *Thelluson v. Bewick*, 1 Esp. N. P. C. 77.

#### Deviation.

107. It seems that any necessity will justify a deviation, unless it might have been prevented by due precaution. *Woolf v. Claggett*, 3 Esp. C. 257.

108. The master of a merchantman, while taking in his loading at a foreign port, is ordered by the captain of a king's ship to go out to sea to examine a strange sail discovered in the offing, bearing enemies' colours: without remonstrating, and without any force or threats being employed to influence his determination, he obeys; and finding the strange sail to be a neutral, he returns to port. Held, that this was an unexcused deviation, which vacated a policy on goods on board the merchantman. *Phelps v. Auldjo*, 2 Camp. 350.

109. Where a ship insured to *Martinique* and all or any of the Windward and Leeward Islands, landed the greatest part of her cargo at *Martinique* and sailed with the residue to *Antigua*, where she was wrecked, while stopping partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo, held that the underwriters were not liable. *Inglis v. Vaux*, 3 Camp. 437.

110. Where a ship was insured from *London* to *Berbice*, with an extensive liberty of touching and trading at all places; held, that by putting into *Madeira* and staying there after the convoy with which she sailed had proceeded on the voyage, she was guilty of a deviation which

which discharged the underwriters; but *semble*, that as the captain did not know when the convoy sailed away, and expected to overtake it, this was not a *deserting of convoy* within the meaning of the convoy act. *Williams v. Shee*, 3 Camp. 469.

111. A vessel may deviate somewhat from the straight line of her track to seek for convoy; and the captain, unless expressly prohibited by the terms of the policy, may always do, when insured, whatever it would be expedient for the common security to do, if uninsured. *D'Aguilar v. Tobin*, 1 Holt, 185.

112. A vessel insured, warranted the property of a neutral nation, must have on board the necessary documents requisite for her protection by the treaty between the neutral and belligerent. *Rich v. Parker*, 2 Esp. C. 615. Documents.

113. If a ship insured is condemned for carrying simulated papers contrary to the law of nations, without having any liberty in the policy to do so, the underwriters are discharged. *Honeyey v. Lushington*, 3 Camp. 85.

114. There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where, from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest, as required by 13 and 14 C. 2. c. 11. and other statutes, but the loss is not occasioned by this defect, the underwriters are liable. *Carruthers v. Gray*, 3 Camp. 142.

115. In an action on a valued policy, it is no defence to prove, that the assured have received the amount of the valuation in this policy from the underwriters on another policy, if the subject matter insured be proved to be of a value equal to the sum received and that sought to be recovered. *Bousfield v. Barnes*, 4 Camp. 228. Double.

116. If goods are fraudulently over-valued in a policy of insurance, with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover, even for the value actually on board. *Haigh and others v. De la Cour*, 3 Camp. 319. Fraud.

117. The underwriters on a policy of insurance are not discharged by an act on the part of the assured, which, to a certain degree, increases the risk, if it does not amount to culpable negligence. Therefore, where three Spanish prisoners of war were received on board a ship, and allowed the free range of it, who might have been reasonably expected to conduct themselves peaceably during the voyage, but who joined in a mutiny, and assisted to run away with the ship, the underwriters were held liable for a loss so happening. *Toulmin v. Inglis*, 1 Camp. 421. Negligence.

118. If, through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss. *Pipon v. Cope*, 1 Camp. 434.

119. A policy on goods is not vitiated by the ship violating the convoy act, without the privity of the assured. *Edwards v. Footner*, 1 Camp. 530.

120. If a fire arises on board a ship from the damaged quality of goods on board, which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to encrease the risk. *Boyd v. Dubois*, 3 Camp. 133.

121. Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call for convoy at a port in the course of the voyage from which convoys are appointed. *Park v. Hamond*, 4 Camp. 344.; S. C. 1 Holt, 80.

122. Ships sailing from foreign ports are not within the convoy act, unless there are persons at those ports authorised to grant convoy or licences. And it is not sufficient to show, that convoys have been actually appointed from those ports, but proof must be given that there are persons stationed there, legally authorised by the admiralty to appoint them. *D'Aguilar v. Tobin*, 1 Holt, 185.

## Partnership.

123. An association of ship-owners for the mutual protection of each other's property, pay each into the hands of a treasurer a sum proportioned to his property in the shipping, as a fund, and each underwrites on the other's shipping a sum proportioned to his property in said fund, no one being answerable for the other: losses are payable out of said fund. Held, that this was not within the prohibition of statute 6 G. 1. c. 18. *Harrison v. Millar*, 2 Esp. C. 513.

124. A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy. *Dowell v. Moon*, 4 Camp. 166.

125. An action cannot be maintained on a policy of insurance, where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade. *Everth v. Blackburne*, 2 Starkie, 66.

## Pleadings.

126. Where a policy in the common printed form on ship and goods contains a written memorandum, declaring the insurance to be on goods, a general averment is proper, that the defendant became an assurer on the premises in the policy mentioned. *Haughton v. Ewbank*, 4 Camp. 89.

## Practice.

127. In policy-causes a judge at chambers will make an order for the assured to produce, upon affidavit, to the underwriters all papers in the possession of the former relative to the matters in issue. *Goldschmidt v. Marryat*, 1 Camp. 562.

## Premium.

128. Where there is an insurance on ship and freight, and the ship has arrived in safety and earned freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest, on account of a defect in his title to the ship. *McCulloch v. Royal Exchange Assurance Company*, 3 Camp. 406.

129. The assured were held not entitled to a return of premium upon a policy at and from a place within the limits of the *South Sea Company's* charter, the ship being without a licence from the *South Sea Company* at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could, and before they knew of her loss, and the licence was made to relate to a time antecedent to the loss. *Cowie and others v. Barber*, 4 M. & S. 16.; S. C. 4 Camp. 100.

130. Where there is an insurance on freight, if the ship be chartered for the voyage, and is guilty of a deviation after sailing upon it, and before any goods are loaded, the assured are not entitled to any return of premium for short interest. *Moses and another v. Pratt*, 4 Camp. 297.

131. A voyage from *Riga* to *Hull* is commenced before a licence has been obtained, which is necessary to legalise the voyage, but under a reasonable expectation that a licence has been obtained, an insurance having been effected here by an agent in *England*, after a licence

licence had been obtained, the assured is entitled to a return of premium. *Henty v. Staniforth*, 1 Starkie, 254.

132. If it is said in a letter that a ship will sail from *St. Domingo* in the month of *October*, it is generally understood that she will not sail till the 25th of the month. *Chaurand v. Angerstein*, Peake, 43. Representation.

133. A representation made by an insurance broker, when the names of the underwriters are put upon a slip, is binding on the assured, unless qualified or withdrawn by some communication upon the subject, between the time and the execution of the policy. *Edwards v. Footner*, 1 Camp. 530.

134. A representation made to any underwriter, except the first on the policy, is not to be considered as made to subsequent underwriters. *Bell v. Carstairs*, 2 Camp. 543.

135. In effecting a policy of insurance from *Russia* to this country, while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, and she was sure to be an early ship: held, that this amounted only to a representation of what was *expected* on the part of the assured, and that the underwriters were liable, although, from the delay in beginning to load the cargo, the voyage home was turned from a summer to a winter risk. *Hubbard v. Glover*, 3 Camp. 313.

136. Under a policy *at and from* a place, it is not necessary that the ship should be sea-worthy at the time of the insurance; therefore, a delay in making necessary repairs will not vacate the policy. *Smith v. Surridge*, 4 Esp. C. 25. Sea-worthiness.

137. A ship, to be sea-worthy, must be rendered as secure as possible from capture, as well as from the perils of the sea. *Waddeburn v. Bell*, 1 Camp. 1.

138. Where a vessel, engaged in the southern whale and seal fishery, and with liberty to chase and capture prizes, is insured in *August* 1807, with a retrospect to 1st *August* 1806, although at the time of her insurance she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties; if she had a competent force to pursue *any* part of her adventure, and could be safely navigated home, she is to be deemed sea-worthy. *Hucks and others v. Thornton*, 1 Holt, 30.

139. An answer by underwriters, on being informed of a partial loss, "that the assured would do the best he could with the damaged property, is not an assent to consider the loss a total one. *Thelluson v. Fletcher*, 1 Esp. N. P. C. 73. Total loss.

140. An assured cannot, by the mere act of abandoning, make that loss total which is only partial. *Thelluson v. Fletcher*, 1 Esp. N. P. C. 73.

141. If a ship insured is captured, carried into a neutral port, and sold to the captain on account of the owners, the assured not having previously abandoned cannot recover for a total loss. *M<sup>c</sup>Masters v. Shoolbred*, 1 Esp. C. 237.

142. Goods protected by a valued policy, being captured, are condemned as lawful prize, the captors paying the freight. The assured may, nevertheless, recover as for a total loss. *Marshall v. Parker*, 2 Camp. 69.

143. The Royal Exchange Assurance Company is liable for a total loss upon a cargo of corn, where a ship, from the perils insured against, becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the corn to its port of destination. *Wilson v. R. E. Ass. Co.* 2 Camp. 623.

144. Where a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, this is a total loss of ship, cargo, and freight, however inconsiderable the damage sustained may be, because the voyage in contemplation is lost. *Manning v. Newnham*, 2 Camp. 624. n.

145. It is stipulated by a policy of insurance from *Riga* to the *United Kingdom*, "that if the ship should not load a cargo at *Riga* by any act of the *Russian* government, the assured were to receive a total loss." The ship is seized and condemned by the *Russian* government before her outward cargo is discharged. This is a total loss within the meaning of the policy. *Bell v. Bell*, 2 Camp. 475.

146. Where goods were insured "at and from *London* to *Quebec*, warranted free of particular average," and the ship was driven back from the banks of *Newfoundland*, and obliged to put into *Kinsale*, where it was impossible to repair her so as to enable her to complete the voyage the same season, and the goods, which, though not of a perishable nature, were to a certain degree damaged, could not be forwarded the same season by any other conveyance: held, that the assured could not, by giving notice of abandonment, come upon the underwriters for a total loss. *Anderson v. Wallis*, 3 Camp. 440.

147. Where there is a valued policy on freight, and the ship is lost while taking in her cargo, the assured can only recover for the freight of the goods actually on board, unless a full cargo be then provided for her, or there be a contract, either written or parol, to supply one. *Patrick v. Eames*, 3 Camp. 441.

148. Goods having been detained by a foreign power are afterwards restored; as between the assurer and the assured, a yielding up of the goods *quasi in integro*, is to be considered as a restoration, notwithstanding some spoliation during the detention. *Jordaine v. Cornwall and others*, 1 Starkie, 6.

149. If a vessel be so shattered by a storm that, in the opinion of the master, who exercises a fair and honest discretion on the subject, she cannot, without imminent peril to the lives of the crew, proceed on her voyage, and cannot be repaired but at an expence exceeding the amount of a total loss, and he accordingly abandons and sells her; the owner may recover from the insurer as for a total loss, although it evidently turns to be possible that the vessel might have proceeded. *Robertson v. Carruthers*, 2 Starkie, 571.

150. If a cargo be so much damaged, that it is not fit to be sent forward to a market, the assured may abandon as for a total loss. *Gernon v. Royal Exchange Assurance Company*, 6 Taunton, 383.; S. C. 1 Holt, 49.

Warranty, what is.

151. An insurance is declared to be "on the cargo, being 1031 hhds. wine." This does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods shall be taken on board. *Muller v. Thompson*, 2 Camp. 610.

152. Insuring a ship by an *English name* does not amount to a warranty or a representation that she is an *English ship*. *Clapham and another v. Cologan*, 3 Camp. 382.

Warranty free from average.

153. If a ship is stranded, the underwriters are liable for an average loss on the articles excepted in the memorandum, where the loss has been occasioned by the perils of the sea, though not by the stranding. *Burnett v. Kensington*, 1 Esp. C. 416.; S. C. 7 T. R. 210.

154. Where property insured is free from average loss under so much

much per cent., the calculation must be made on the property as it stood when the loss happened. *Rohh v. Parr*, 1 Esp. C. 446.

155. Malt is oorn within the exception from average loss in a common policy. *Moody v. Surridge*, 2 Esp. C. 633.

156. Where there is a warranty, in a policy of insurance, against average, "unless general, or the ship be stranded," if, during the voyage, the ship is forced a shore by the wind, or is driven on a bank, and remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage. *Harman v. Vaux*, 3 Camp. 429.

157. The striking of a ship on a rock where she remained a minute and a half, and was laid on her beam-ends, was held not to constitute a stranding within the meaning of that term in a policy of insurance. *M'Dougle v. Royal Exchange Assurance Company*, 4 M. & S. 503.; S. C. 4 Camp. 283.; S. C. 1 Starkie, 130.

158. To constitute a stranding it is essential that the vessel should be stationary; the striking on a rock, where the vessel remains for a minute and a half only, is not a stranding, though she thereby receives an injury which eventually proves fatal. *M'Dougle v. The Royal Exchange Assurance Company*, 1 Starkie, 130.

159. By the terms of the policy the underwriter binds himself to pay average separately on each particular package of the goods insured; this stipulation does not preclude the assured from recovering an average loss upon the whole exceeding three per cent. under the usual clause in the policy. And in such case, although several packages remain uninjured, they are to be included in the average. *Hagedonn v. Whitmore*, 1 Starkie, 157.

160. A vessel strikes upon a rock, and remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding. *Baker v. Towry*, 1 Starkie, 436.

161. Sugars are insured free of particular average. The whole cargo, consisting of 54 hogsheads, is so far damaged by sea-water, that the amount of what is safe and undamaged, as collected from the several hogsheads, does not exceed one entire hogshead. In an action against the underwriter for a total loss, held, that the memorandum in the policy, *free of particular average*, protected him from all liability. *Hedbergh and another v. Pearson*, 1 Holt, 349.

162. A ship does not sail with convoy within the meaning of a warranty in a policy, unless she has her sailing instructions on board at the time of starting. *Anderson v. Pitcher and wife*, 3 Esp. C. 124. Warranty for  
convoy.

163. To vacate a policy of insurance for an infraction of the convoy act, it is not enough to show that the ship sailed without convoy, by the instrumentality of an agent of the assured, unless it appear that the agent had authority from his principal for this purpose. *Carstairs and others v. Allnut*, 3 Camp. 497.

164. Where there is a warranty in a policy of insurance, that the ship shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships on other destinations between the loading port and place of rendezvous. *Warwick v. Scott*, 4 Camp. 62.

165. A ship insured is to be considered as having sailed with convoy from a particular port, if she joined the convoying ship, and received sailing



sailing instructions within the limits of the port, although the latter ship dropped down fifteen leagues from the place of loading, with the greatest part of the fleet, several days before the ship insured, she being detained with some other ships for want of pilots. *Ridsdale and others v. Shedden*, 4 Camp. 108.

Warranty to sail  
on a particular  
day.

166. If, in a policy of insurance "at and from *Surinam*, and all or any of the *West India Islands to London*," the ship is warranted to sail on or before the first of *August*, it is a sufficient compliance with the warranty if she sail on or before that day from the final port of loading on the homeward voyage, although she afterwards touch at one of the *West India Islands* to join convoy. *Wright v. Shifner*, 2 Camp. 247.

167. Held, that where a ship insured is warranted to depart on or before a given day, she must actually be out of her port of departure on that day, and that it is not enough that she broke ground and commenced the homeward voyage, so as to have satisfied a warranty to sail on that day. *Moir v. Exchange Assurance*, 4 Camp. 84.

168. A policy at and from *Portneuf*, a place above *Quebec*, contained a warranty to sail on or before 28th *October*. Before that day, the ship actually did sail from *Portneuf* to *Quebec* with a crew sufficient for river navigation. She did not obtain her custom-house clearances at *Quebec* (where all ships coming down the *St. Lawrence* clear out) till the 29th, and she there received some men on board to complete the crew for the voyage. For want of a pilot, she did not proceed from *Quebec* till the 30th: held, that under these circumstances the warranty to sail on or before 28th *October* had not been complied with. *Ridsdale and others v. Newnham*, 4 Camp. 111.

Warranty, dis-  
charge of.

169. Inevitable necessity is no excuse for non-compliance with a warranty in a policy. *Anderson v. Pitcher and wife*, 3 Esp. C. 124.

## INSURANCE ON LIVES.

Interest there-  
in, to whom be-  
longing.

The interest in a policy on the life of a debtor, as a security for the debt, the premiums on which are paid by him, devolves, on the debt being discharged, to the debtor himself. *Holland v. Smith*, 6 Esp. C. 11.

## INSURANCE FROM FIRE.

Construction.

1. Policy of insurance against fire on a manufactory: from the negligence of a servant of the assured, in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room, and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been, had there been free vent for the smoke and heat: this held not to be a loss within the policy. *Austin v. Drew*, 4 Camp. 360.; 1 Holt, 126.

2. If a person who is not a linen-draper insures his "stock in trade, household furniture, *linen*, wearing apparel, and plate," by a policy against fire, this will not protect linen-draper goods subsequently purchased on speculation; and the word "*linen*" in the policy must be confined to household linen, or linnen used by way of apparel. *Watchorn v. Langford and others*, 3 Camp. 422.

3. A coffee-house is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an innkeeper, with others, as double hazardous. *Doe ex dem. Pitt v. Laming*, 4 Camp. 76.

## INTEREST.

1. In an action for money had and received, the plaintiff is not entitled to interest, even from the time of making a demand of the principal, unless, 1st, he give in evidence an express promise to pay interest; or, 2dly, show something from which such a promise may be inferred; or, 3dly, prove that the money has been used by the defendant, and interest has been made of it; and, *comme semble*, the only other instance in which interest is recoverable, is upon a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c. *De Havilland v. Bowerbank*, 1 Camp. 50. General rule.

2. Interest is not due on a balance struck on a settlement of accounts, unless the balance is to be paid at a particular day, and then only from that day. *Chalie v. Duke of York*, 6 Esp. C. 45. Accounts balanced.

3. Interest given on the balance of an account, where it appeared from the account that interest had been allowed on former balances. *Nichol v. Thompson*, 1 Camp. 52. n.

4. Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest afterwards. *Pinhorn and others v. Tuckington*, 3 Camp. 468.

5. An agent who has advanced money for his principal, in effecting insurances and other mercantile business, is entitled to charge interest, and at the end of every year to make a rest and add the interest then due to the principal. *Bruce and others v. Hunter*, 3 Camp. 467. Agency.

6. Where the sum total of a note payable by instalments is to be paid on default in any of the instalments, the interest on a default is to be calculated on the entire sum remaining unpaid. *Blake v. Lawrence*, 4 Esp. C. 147. Bill of exchange.

7. In an action against the drawer of a foreign bill of exchange dishonoured here for non-acceptance, where the plaintiff is allowed a per centage in name of damages, he is only entitled to interest from the day when the bill ought to have been paid. *Grant v. Mackensie*, 3 Camp. 51.

8. Where there is no allowance for damages, the plaintiff is entitled to interest, from the day the bill was dishonoured for non-acceptance. *Grant v. Makensie*. 3 Camp. 52. The interest.

9. A bill is drawn for the sum of 100*l.*, payable 4 months after date, bearing interest. The interest is to be calculated from the date of the bill. *Kennreley v. Nash*, 1 Starkie, 452.

10. *Semble*, the drawer of an inland bill of exchange, is liable to pay interest on the bill which has been noted for non-acceptance, but not protested. *Windle v. Andrews*, 2 Starkie, 425. Bond.

11. The interest due on a bond subsequent to the day of payment, is lost by accepting the principal. *Dixon v. Parkes and another*, 1 Esp. N. P. C. 110.

12. A bond conditioned for the payment of a specified sum to *A.* after

after the death of *B.* and *C.*, and the survivor of them, will bear interest after the death of *B.* and *C.*, although the engagement was perfectly voluntary; and although the principal was payable on a contingency. *Quære*, if after payment of the principal an action can be maintained for the interest only. *Hellier and another v. Franklin*, 1 Starkie, 291.

Compound. 13. Bankers cannot charge interest upon interest, without an express contract for that purpose. *Dawes v. Pinner*, 2 Camp. 486.

Foreign judgment. 14. The plaintiff is not entitled to interest in an action on a foreign judgment. *Atkinson v. Lord Braybrooke*, 4 Camp. 380.; *S. C.* 1 Starkie, 219.

Fraud. 15. Although money has been obtained fraudulently, interest will not be allowed upon it on that account, in an action of *assumpsit* to recover it back. *Crockford v. Winter*, 1 Camp. 129.

Insurance. 16. In an action on a policy of insurance, the plaintiff cannot recover interest upon the sum insured. *Kingston v. McIntosh*, 1 Camp. 518.

Loan. 17. In an action to recover the interest upon monies advanced to the defendant by a banking house, it is not sufficient to show, that it was the general custom of the house to charge interest calculated upon half-yearly rents, without also showing that the defendant knew that such was the practice. *Moore and others v. Voughton*, 1 Starkie, 487.

Payment. 18. In an action for money had and received, to recover a sum paid by a third person into the defendant's hands for the plaintiff's use, the plaintiff is not entitled to interest. *De Bernales v. Fuller*, 2 Camp. 462.

Sale. 19. In the exchequer chamber, interest will be allowed in an action for not giving a bill of exchange in payment of goods sold, from the time when the bill, if given, would have become due. *Becher v. Jones*, 2 Camp. 428. n.

20. But where there was no agreement to give a bill, interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day. *Gordon v. Swan*, 2 Camp. 429. n.

21. When goods are sold to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time the bill, if given, would have become due. *Porter v. Palsgrave*, 2 Camp. 472.

22. If goods are sold to be paid for by a bill of exchange, in an action by the vendor against the purchaser for not giving a bill accordingly, interest will be allowed from the time the bill, if given, would have become due, whether the defendant has, or has not, accepted the goods. *Boyce v. Warburton*, 2 Camp. 480.

Tithes. 23. Where a payment in lieu of tithes is fixed at a particular day, interest runs from that day. *Secus* where the agreement is general at so much a-year. *Shipley v. Hammond*, 5 Esp. C. 114.

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## JUDGMENT.

Pleadings.

In setting out the judgment roll, a variance in the name of the party associated with the judge, at the trial of the cause is fatal. *Rex v. Eden*, 1 Esp. N. P. C. 98.

## JUSTICE OF PEACE.

1. A person who has qualified for the office of a justice of peace, and acts as such, must have a clear estate of 100*l.* per annum, in law, or in equity, for his own use in possession. *Wright v. Horton*, 1 Holt, 458. Qualification of.

2. In an action against a person for the penalty given by the statute 18 Geo. 2. c. 20., for acting as a magistrate without a proper qualification, no notice of action is necessary under the provisions of the 24 Geo. 2. c. 44. *Wright v. Horton*, 1 Holt, 458.

3. *Quære*, whether a justice of peace has a right to commit for a contempt when not sitting in court? *Pettit v. Addington*, Peake, 62. Arrest and commitments by.

4. *Semble*, that a magistrate has the power of apprehending, and of requiring bail of a libeller, and for want of it committed him. *Butt v. Conant*, 1 Gow, p. 84.

5. A justice's warrant continues in force until fully executed. *Dickinson v. Brown*, Peake, 234. Warrant of.

6. Where magistrates restore goods seized under their warrant, if a permit is necessary to remove them from the office they should obtain one for the owner. *Price v. Messenger* and another, 3 Esp. C. 200.

7. If the putative father of a bastard is taken under a warrant, and discharged on a promise to find sureties, and a consent, that in the mean time the warrant shall remain in force, he may be arrested again under the warrant on making default. But *quære*, if he can without such consent? *Dickinson v. Brown* and another, 1 Esp. N. P. C. 218. Bastardy.

8. If *A.* be indicted for felony, and the judge who tries the cause, order the justice before whom the information was laid to retain the goods in his possession until it appears who is entitled to them, it is not necessary to give such justice a month's notice previous to commencing an action against him for the conversion of them. *Licet v. Reid*, Peake, 35. Action against

9. If a notice of action given to a magistrate values the property taken at a specific sum, which sum has been tendered as amends, the magistrate must have a verdict. *Stringer v. Martyr*, 6 Esp. 134.

10. Where, in a notice of action against a magistrate, the attorney described himself as of a place in *London*, which in fact was in *Westminster*, the variance was held fatal. *Stears v. Smith*, 6 Esp. C. 138.

11. A notice to magistrates under 24 G. 2. c. 44., need not specify the form of action to be brought. It is sufficient if it states the writ or process, and the cause of action. *Sabin v. De Burgh*, 2 Camp. 196.

## LANDLORD AND TENANT.

1. Held, that acceptance of rent accruing subsequent to a forfeiture is not an acknowledgment of the lease, if the demise in ejectment is laid subsequent to the day on which the rent accrued. *Fryett ex dem. Harris v. Jeffreys*, 1 Esp. C. 393. But see *Goodnight v. Davids*, Cowp. 803. Relation of.

2. A mere treaty for a new lease, will not be a sufficient acknowledgment to constitute a tenancy from year to year, although the tenant should continue in possession during the treaty. *Doc ex dem. Hollingsworth, v. Stennett*, 2 Esp. C. 717.

3. If

3. If an instrument professing to be an agreement for a lease, when taken altogether, appears intended to transfer possession and a present interest in the premises to the tenant, it will be treated as a lease, although it contain a stipulation for subsequently executing a lease under seal. *Poole v. Bentley*, 2 Camp. 286.

4. If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy. *Panton v. Jones*, 3 Camp. 372.

5. A tenant in possession under an agreement for a lease, holds from year to year, on the conditions specified in the agreement; therefore if a clause of re-entry is annexed to the breach of them, ejectment lies on such breach though no lease has been executed. *Doe ex dem. Oldershaw and another v. Breach*, 6 Esp. C. 106.

6. *A.* by parol lets a house to *B.*, who underlets to *C.*; *A.* with *B.*'s assent accepts *C.* as his tenant, and receives rent from him. *A.* cannot afterwards recover against *B.* since the privity of estate is destroyed. *Thomas v. Cooke*, 2 Starkie, 408.

7. A tenant let into possession under an agreement, which in the end is not executed by the lessor, holds upon the terms of that agreement so far as he legally may, and is therefore entitled to the precise notice to quit therein stipulated. *Doe ex dem. Peacock v. Raffan*, 6 Esp. C. 4.

8. Though an agreement for use and occupation be void by the statute of frauds; nevertheless, if the tenant takes possession of the premises under it, he becomes a tenant at will, and recourse may be had to the original agreement to calculate the amount of rent. *De Medina v. Polson*, 1 Holt, 47.

Agreement for  
a lease.

9. *Quare*, whether an agreement to take premises is dissolved by their being burnt down before the day on which possession is to be taken? *Phillipson v. Leigh*, 1 Esp. C. 398.

Lease; con-  
struction.

10. Whether Michaelmas in a lease, means Old or New Michaelmas, depends upon the custom of the country. *Furley ex dem. Corporation of Canterbury v. Wood*, 1 Esp. N. P. C. 198.

11. Under a demise of a parcel of land "containing 59 feet more or less," describing the abutments, all included within the abutments, passes, though exceeding 59 feet. *Neal ex dem. Leroux v. Parkin and another*, 1 Esp. C. 229.

12. Where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter-day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters; and the tenancy can only be determined by a notice expiring that day of the year, or some other quarter day calculated from thence. *Kemp v. Derrett*, 3 Camp. 510.

13. Covenant in a lease to insure and keep insured, a specified sum of money upon the premises. The lessee effects such an insurance, the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death. The lessee dies, and an indorsement containing the policy to his personal representative was made after the expir-

expiration of three months from the time of his decease. Held, that under these circumstances there was no breach of the covenant to keep the premises insured. *Doe ex dem. Pitt v. Laming*, 4 Camp. 73.

14. Letting lodgings is not a breach of a covenant in a lease, not to underlet any part of the premises without the licence of the lessor. *Doe ex dem. Pitt v. Laming*, 4 Camp. 77.

15. An agreement between landlord and tenant, — “that the latter shall be at liberty to quit at Lady-day 1814, in which event the former undertakes to receive the fixtures at a valuation, or to permit the tenant to let the house to a respectable tenant,” — creates an option to be exercised by the tenant in case he gives up the premises. A letting by the tenant to an undertenant till Lady-day, 1814, is not an exercise of his right of option. *Cotton v. Lingham*, 1 Starkie, 39.

16. Agreement to let a house for a year, the rent to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession. *Semble*, this stipulation relates to the first quarter's rent only. *Holland v. Palser*, 2 Starkie, 161.

17. By the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, is to be understood, all that is occupied together, as the entire messuage of one and the same time. And, therefore, such a demise will not comprehend a room which had once formed a part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previous to the demise. *Kerslake v. White*, 2 Starkie, 508.

18. The custom of the country in which lands demised are situated, is evidence in explanation of the lease. *Furley, ex dem. Corporation of Canterbury v. Wood*, 1 Esp. N. P. C. 198. Lease; custom of the country.

19. Where a demise at an entire rent, is void as to part of the premises, it is void as to all. *Doe ex dem. Griffiths v. Lloyd*, 3 Esp. C. 78. Lease; entirety of.

20. A covenant not to assign or underlet any part of demised premises without the lessor's permission in writing, is a fair and usual covenant. *Morgan v. Slaughter*, 1 Esp. N. P. C. 9. Lease; usual covenants.

21. In an indenture of lease with a clause of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; and it is further stipulated by an independent covenant, that the tenant within the three months from notice being served upon him by the landlord, shall repair all defects specified in the notice. The landlord, after serving him with a notice, may within three months bring an ejectment against him for a breach of the general covenant to repair. *Roe d. Goatly v. Payne*, 2 Camp. 520. Covenant to repair.

22. If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire, on their being burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter. *Digby v. Atkinson and another*, 4 Camp. 275.

23. The breaking a doorway through the wall of a demised house, into an adjoining house and keeping it open for a long space of time, amounts to a breach of covenant to repair. *Doe dem. Vickery v. Jackson*, 2 Starkie, 293.

24. A tenant from year to year is not obliged to make substantial repairs, but to repair so far only, that the premises, such as they are, may not suffer from his neglect. *Ferguson v. ———*, 2 Esp. C. 590. Repairs by tenant from year to year.

25. Tenant at will is not liable to general repairs; he is bound to use Repairs by tenant at will,

use the premises in a husbandlike manner, but to nothing farther. *Horsefall v. Mather*, 1 Holt, 7.

Covenant, miscellaneous.

26. A covenant in the lease of a house "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," is not void for uncertainty, but means that the premises shall be insured against fire in some offices where insurances against fire are usually effected. Where there was such covenant in a lease on the part of the tenant, he effected an annual policy on the premises with an insurance company in the usual printed form, by which it is declared that the policy shall be for such longer period as the tenant shall regularly pay, and the company receive the premium, and a space of 15 days beyond the quarter-days is given for payment of the premium, during which time the company is liable. The year expired on the 25th of March 1811, but the tenant did not pay the premium for a renewal till the 25th of April following. The company then gave a receipt for the premium, stating the insurance to be from Lady-Day 1811, to Lady-Day 1812. Held, that the covenant was broken by reason of the non-payment of the premium, on or before the 9th of April, and that the lease was forfeited upon a clause of re-entry. *Doe v. Shewin*, 3 Camp. 134.

Proviso for re-entry.

27. A lease contains a proviso for re-entry, in case the rent shall be 21 days in arrear, and there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the 21 days, but continues in possession of the distress upon the premises until after the expiration of 21 days, does not thereby waive his right of re-entry. *Doe ex dem. Taylor v. Johnson*, 1 Starkie, 411.

Power to lease.

28. A power of leasing at the best rent that can be obtained, means the best that can be obtained at the time of leasing, without reference to reservations on former leases *Doe ex dem. Griffiths v. Lloyd*, 3 Esp. C. 79.

Assignment and assignee.

29. *A.* being assignee of a lease, puts it up to auction; *B.* becomes the purchaser, pays a deposit, and orders an assignment to him to be prepared by *A.*'s solicitor: which is accordingly prepared and executed by *A.*, but instead of being delivered to *B.*, it remains in the possession of the solicitor, who claims a lien for the expence of preparing it. Held, that to an action against *A.* as assignee of the term for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due, he had assigned to *B.* *Odell v. Wake* and another, 3 Camp. 394.

30. *Quære*, whether a covenant by the lessee of a public house, that he and his assigns will buy all their beer of the plaintiffs, is binding on the assignee? *Hartley v. Pehall, Peake*, 131.

Acceptance of under-tenant.

31. An attestation by the landlord to a written notice given by his tenant, on the expiration of his lease, to a sub-lessee requiring him in future to pay his rent to the landlord, and with the contents of which the landlord was acquainted, is a sufficient acceptance of the sub-lessee as tenant in room of the other. *Harding v. Crethorn*, 1 Esp. N. P. C. 57.

Encroachment.

32. A landlord who sees without objection his tenant encroaching and building upon his land adjoining the premises, but not included in the lease, will be taken to have consented that it shall be added to it. *Doe ex dem. Wruckley v. Pye*, 1 Esp. C. 366.

33. If a tenant add to the premises by encroachment, and remain in possession long enough to gain a possessory title, *quære*, whether the encroachment is transmitted to the landlord by the termination of the lease as having been made for his benefit? *Doe ex dem. Colclough v. Mulliner*, 1 Esp. C. 460.; *Doe ex dem. Challnor v. Davies*, Id. 461.

34. Although

34. Although double the value of goods fraudulently removed to prevent a distress, does not exceed 50*l.*, it is competent to the party injured to proceed either by action, or in a summary way, before a magistrate. *Horsefall v. Davy*, 1 Starkie, p. 169. Fraudulent removal of goods.

35. And the fact of his having, in the first instance, made his complaint before a magistrate, will not preclude him from afterwards maintaining an action. *Horsefall v. Davy*, 1 Starkie, 169.

36. Whether a year's notice to quit is necessary, when it has been the custom to give that notice, *quære*. *Roe d. Henderson v. Charnock, Peake*, 4. Notice to quit.

37. If a house is taken by the month, a month's notice to quit is sufficient. *Doe ex dem. Parry v. Hazell*, 1 Esp. N. P. C. 94.

38. A quarterly reservation of rent will not dispense with the necessity of a six month's notice to quit; though it seems that if the tenant accept in such case a three month's notice without expressing either his assent, or dissent to it, it will be presumptive evidence of an agreement, that a notice for three months should be sufficient. *Shirley v. Newman*, 1 Esp. C. 266.

39. When the landlord is ignorant of the time when the term of his tenant commenced, a notice to quit, not specifying any particular day, but ordering the tenant, in general terms, to quit and deliver up the possession of the premises,—“at the end and expiration of the current year of his tenancy thereof, which shall expire next after the end of one half year from the date of the notice,” is sufficient. *Doe ex dem. Phillips v. Butler*, 2 Esp. C. 589.

40. If the tenant, having been applied to by his landlord, respecting the time of the commencement of his tenancy, has informed him that it began on a certain day, and in consequence of such information, a notice to quit on that day is given at a subsequent period, the tenant is concluded by his own act. *Doe ex dem. Eyre and another v. Lambly*, 2 Esp. C. 635.

41. A notice to quit not addressed to the tenant in possession, but proved to have been served personally upon him, is sufficient. *Doe ex dem. Matthewson v. Wrightman*, 4 Esp. C. 5.

42. A notice to quit on one of two days in the alternative is sufficient, if served six months before the expiration of the tenancy. *Doe ex dem. Matthewson v. Wrightman*, 4 Esp. C. 6.

43. A mis-description of the premises in a notice to quit, which can lead to no mistake, is immaterial. *Doe ex dem. Cox and others v. ———*, 4 Esp. C. 185.

44. It is not necessary that the notice to quit should be in writing, except when required to be so under some express agreement. *Doe ex dem. Lord Macartney v. Crick and another*, 5 Esp. C. 196.

45. A parol notice to quit given to one co-tenant only, will bind his fellow. *Doe ex dem. Macartney v. Crick and another*, 5 Esp. C. 196.

46. Where *A. B. and C.*, were joint tenants, and *A. and B.* signed and delivered a notice to the tenant “on behalf of themselves and *C.*”; held, that this notice could not be supported, though *C.* joined in the demise in the ejectment. *Right ex dem. Fisher and others v. Cuthell*, 5 Esp. C. 149; *S. C.* 5 East, 491.; see 3 Taunt. 120.

47. Serving a notice to quit at the house, without proof, express or presumptive, that it came to the tenant's hands, is insufficient. *Doe ex dem. Buross and others v. Lucas and others*, 5 Esp. C. 153.

48. If there be a lease for years commencing on one day, and terminating on another, as for example, commencing at Lady-Day and terminating at Lady-Day, the lease is void. *Vol. V.* termini



terminating at Michaelmas, a tenancy created by the landlord's receipt of rent, after the expiration of the lease, will be held to commence at Michaelmas, and to require half a year's notice from Lady-day. A principle that extends to persons coming into possession after the expiration of the lease, as assignees of the lessee, or his assigns. *Doe ex dem. Castleton and others v. Samuel*, 5 Esp. C. 173.

49. A weekly tenancy is inferred from the weekly payment of rent ; therefore a week's notice to quit is sufficient. *Doe ex dem. Peacock v. Raffan*, 6 Esp. C. 4.

50. Where a tenant comes in the middle of a quarter, and afterwards pays his rent for that half quarter, and then continues to pay from the commencement of the succeeding, his tenancy begins not with his coming in, but from the succeeding quarter day. *Doe ex dem. Holcomb v. Johnson*, 6 Esp. C. 10.

51. Where the six month's notice to quit requisite to determine a tenancy includes a period less than six *calendar* months, the addition of the word *calendar* in the notice is surplusage. *Howard v. Wemsley*, 6 Esp. C. 53.

52. A mistake of the tenant's Christian name in a notice to quit is waived by his keeping it. *Doe v. Spiller*, 6 Esp. C. 70.

53. Premises are let from year to year, upon an agreement, that either party may determine the tenancy by a quarter's notice. This notice must expire at that period of the year when the tenancy commenced. *Doe d. Pitcher v. Dousvan*, 2 Camp. 78.

54. If a tenant from year to year hold from old Michaelmas, a notice to quit "at Michaelmas," generally, is good. *Doe v. Vince*, 2 Camp. 257.

55. If a man get into possession of a house to be let, without the privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ upon the terms ; the landlord may maintain ejectment to recover possession of the premises, without giving any notice to quit. *Doe d. Knight v. Quigley*, 2 Camp. 505.

56. Where rent is usually paid at a banker's, if the banker, without any special authority, receive rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waived. *Doe v. Calvert*, 2 Camp. 386.

57. If premises be taken "for twelve months certain, and six month's notice to quit afterwards," the tenancy may be determined by a six month's notice to quit expiring at the end of the first year. *Thompson v. Maberley*, 2 Camp. 573.

58. When a house, lands, and tithes, are held under a parol demise, at a joint rent, a notice to quit "the house, lands and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy. *Seemle*, that although tithes are let by parol, the tenant is entitled to a notice to quit. *Doe v. Church*, 3 Camp. 71.

59. If after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first. *Doe v. Steel*, 3 Camp. 117.

Determination  
of tenancy.

60. By the terms of a deed of co-partnership, an house is to be used and occupied by the co-partners during the co-partnership. After a dissolution of partnership, no notice to quit is necessary, previous to an action of ejectment against a co-partner. *Doe ex dem. Waihtman and others v. Miles*, 1 Starkie, 181.

61. Where a tenant has quitted without notice, the landlord, by advertising

vertising the premises to be let, does not waive his claim against the tenant. *Redpath v. Roberts*, 3 Esp. C. 225.

62. A tenancy from year to year created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly. *Mollett v. Brayne*, 2 Camp. 97.

Repairs by tenant at will.

63. *Semble*, an agreement between a landlord and a tenant, from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, determines the tenancy of the first tenant. *Stone v. Whiting*, 2 Starkie, 235.

64. The defendant being tenant to the plaintiff of certain rooms in his house, at a rent payable quarterly, a mere parol agreement in the middle of a quarter to determine the tenancy is not binding. *Thompson v. Wilson*, 2 Starkie, 379.

65. A tenant is liable as for the occupation of premises subsequent to the expiration of his lease, unless he has delivered up possession to the landlord, or the landlord has accepted another, for instance, a sub-lessee, as tenant in his room. *Harding v. Crethorn*, 1 Esp. N. P. C. 57.

Holding over.

66. That a tenant may be liable for double value, under statute 4 Geo. 2. c. 28., the holding over must be wilful; hence, he is not liable where done under a claim of right. *Wright v. Smith*, 5 Esp. C. 203.

67. Debt for double value on 4 Geo. 2. c. 28. does not lie against a weekly tenant. *Lloyd v. Rosbee*, 2 Camp. 453.

68. If tenant from year to year give his landlord notice that he will quit upon a contingency, and do not quit when the contingency happens, he is not liable to an action on 11 G. 2. c. 19. for double rent. *Farrance v. Elkington*, 2 Camp. 591.

69. If, after the expiration of a written lease, containing a covenant by the tenant to keep the premises in repair, he verbally agree to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and if the premises be afterwards burnt down by accidental fire, he is bound to rebuild them. *Digby v. Atkinson and another*, 4 Camp. 275.

70. Buildings erected by a tenant for the purposes of trade may be removed, notwithstanding a covenant in his lease to leave all erections built during the term. *Dean v. Allalley*, 3 Esp. C. 11.

Fixtures.

71. *Semble*, a tenant was permitted to remove Dutch barns erected during the term, notwithstanding a covenant in his lease to leave all erections built during its continuance, since that was construed to mean buildings made parcel of the freehold, such as additions to the house. *Dean v. Allalley*, 3 Esp. C. 11. But see 3 East, 38. See Ham. N. P. 140.

72. Buildings erected by a tenant, not for agricultural but commercial purposes, are removeable either during the term or after its expiration. *Penton v. Robart*, 4 Esp. C. 33.; S. C. 2 East, 88.

73. A tenant of a house covenants to keep in repair the premises, and all erections, buildings, and improvements erected on the same, during the term, and to yield up the same at the end of the term, cannot remove a viranda erected during the term, the lower part of which is affixed to the ground by means of posts. *Administratrix of Pency v. Brown*, 2 Starkie, 403.

74. A refusal to pay rent to a devisee in a will which was con-

Disputing landlord's title.

tested, is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit. *Williams v. Pasquali, Peake, 196.*

75. One let into possession of premises, and informed that they are held of another, cannot dispute the landlord's title, if the party from whom he derived the possession could not. *Johnson v. Mason, 1 Esp. N. P. C. 91.*

76. *A.*, who claims to hold lands under *B.* as a security for a debt, cannot defend an ejectment against the assignees of *B.*, after his bankruptcy, on the ground that the grant under which *B.* derives his title from the crown is void. *Doe ex dem. Biddle v. Abrahams, 1 Starkie, 305.*

77. A defendant in ejectment who has paid rent to the lessor of the plaintiff, may show that his landlord, pending the term, sold his interest in the premises. *Doe dem. Lowden v. Watson, 2 Starkie, 230.*

78. In an action of replevin, the landlord's title under which the tenant has gained possession of the premises cannot be disputed, although the tenant is prepared with evidence to show that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person. The plea of *nil habuit*, &c. cannot be pleaded, nor can evidence be given which amounts to it. *Parry v. House, 1 Holt, 481.*

Trees.

79. A covenant in lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded. *Doe dem. Jones et ux. v. Crouch, 2 Camp. 449.*

Sale

80. A landlord having given notice to his lessee (under a covenant in the lease) that he would re-enter if the premises were not put into repair within three months; if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of sale. *Stevens v. Adams, 2 Starkie, 422.*

## LAND TAX.

Clerk to the commissioners.

If a clerk to the commissioners of the land-tax be appointed clerk to the commissioners for managing other taxes, his deputy, who performed all the duties of his office, is not therefore entitled to an increase of salary. *Bell v. Drummond, Peake, 45.*

## LEASE AND RELEASE.

Lease.

A lease for a year to *A.* and his wife will support a release to *A.* and a third person. *Doe ex dem. Saunders v. Cooper, 1 Holt, 461.*

## LEGACY.

Payment of.

1. After a year from the testator's death, the executor is justified in paying legacies, and the surplus over to the residuary legatee, unless

unless he knows or has notice given to him of outstanding claims. *The Corporation of Chelsea Waterworks v. Cowper*, 1 Esp. C. 275.

2. A legal demand unliquidated is not satisfied by a legacy. *Le Sage v. Coussmaker and others*, 1 Esp. N. P. C. 187.

How far payment.

3. No action at law lies for a legacy. *Farish v. Wilson, Peake*, 73.

Action for.

4. An action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe ex dem. Lord Saye and Selc v. Guy*, 4 Esp. C. 154.; S. C. 3 East, 120.

5. *A.* bequeaths to *B.* 1200*l.*, and appoints *C.* executor of her will; *C.* has sufficient assets, but does not pay the legacy to *B.*; *C.* afterwards makes his will, by which he bequeaths to *B.* an annuity of 100*l.*, and expresses it to be "in satisfaction of the debt or sum of 1200*l.*," but which annuity *B.* does not accept: held, that the 1200*l.* is money had and received to the use of *B.*, and may be recovered in that form of action. *Ann Gorton v. Dyron*, 1 Gow, 78.

## LIBEL.

1. A letter written confidentially to persons who employed *A.* as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which *B.*, the writer of the letter, was likewise interested, cannot be considered a libel, and made the subject of an action for damages. *McDougall v. Clariage*, 1 Camp. 267.

What shall be

2. In like manner, verbal communications, when confidential, are not actionable. Thus, if *A.* is surety for *B.* to *C.*, *A.*, if acting *bond fide*, may lawfully state to *C.*, in an unreserved manner, his opinion of *B.*'s conduct and character, whatever the charges may be which he thus imputes to him. *Dunman v. Bigg*, 1 Camp. 269.n.

3. Although it is lawful for an author to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable falsely to impute to him the publication of any immoral or absurd literary production. *Tabart v. Tipper*, 1 Camp. 350.

4. It is not libellous for a writer, who allows the sovereign to be solicitous for the welfare of his subjects, and who has no intention of calumniating him, or of bringing his personal government into public odium, to express regret that he has taken an erroneous way of any question of foreign or domestic policy. *Rex v. Lambert*, 2 Camp. 398.

5. So, though it be an aggravated misdemeanor to publish an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice in the country, still it is lawful with candour and decency to discuss the merits of the verdict of a jury, or the decisions of a judge. *Rex v. White*, 1 Camp. 359.n.

6. An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely spoken. *Earl of Leicester v. Walter*, 3 Camp. 214.

7. An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt, is libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the

measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. *Brown v. Croome*, 2 Starkie, 297.

## Intention.

8. To a libel, an evil intention is essential; but that may be inferred from the publication, unless explained. *Rex v. Lord Abingdon*, 1 Esp. C. 229.

## Judicial proceedings.

9. Though the publisher of proceedings in a court of justice need not detail them *verbatim et liberatim*, yet he must be careful that his account varies not substantially from the original, and that the impression it is calculated to excite in the reader's mind towards the party accused is not less favourable than what he would have received had he witnessed the original proceeding. *Curry v. Walter*, 1 Esp. C. 456.; S. C. 8 T. R. 298.

10. An impartial detail of the proceedings in a court of justice, reflecting on a man's character, is not actionable. *Curry v. Walter*, 1 Esp. C. 456.; S. C. 8 T. R. 298.

11. The publication of *ex parte* examinations, taken by a magistrate previous to trial, is a libel. *Rex v. Lee*, 5 Esp. C. 123.

12. An action does not lie against the members of a court-martial for reflecting on the conduct of the officer tried, in giving their sentence or judgment. *Jekyll v. Sir John Moore*, 6 Esp. C. 63.

13. It is libellous to publish the preliminary examinations taken as *ex parte* before a magistrate, previous to committing a man for trial, or holding him to bail for an offence with which he is charged; the tendency of such a publication being to prejudice the minds of jurymen against the accused, and to deprive him of a fair trial. *Rex v. Fisher*, 2 Camp. 563.

## Criticism.

14. A writing which accuses a newspaper of scurrility is not actionable; but one which asserts that it has a narrow circulation is, since that may depreciate its sale. *Heriot v. Stuart*, 1 Esp. C. 437.

15. It is not libellous to ridicule a literary composition, or the author of it, in as far as he has embodied himself with his work; and if he is not followed into domestic life for the purposes of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous. *Sir John Carr, Knight, v. Hood*, 1 Camp. 350. n.

16. The editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper. *Stuart v. Lovell*, 2 Starkie, 93.

## Speech in parliament.

17. A member of parliament is not accountable for any thing he says in parliament; but if he publishes his speech, and it is libellous, he is answerable for the publication. *Rex v. Lord Abingdon*, 1 Esp. C. 226.

## Publication.

18. To send a libel to the party himself is not a publication, and therefore though indictable is not actionable. *Phillips v. Jansen*, 2 Esp. C. 624.

19. A person who, having a copy of a libellous caricature, shows it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it. *Smith v. Wood*, 3 Camp. 323.

20. In an action for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury, whether there has been any publication of the libel, except to the plaintiff himself; and if there has not, the defendant is entitled to their verdict. *Clutterbuck v. Chaffers*, 1 Starkie, 471.

21. The delivery of a pamphlet by the governor of a distant province to his attorney-general, not for any public purpose, but in order

order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel. *Wyatt v. Gore*, 1 Holt, 299.

22. If a libellous letter be sent by the post, addressed to the prosecutor at a place out of the county, in which the venue is laid in an indictment for the libel, still if it were first received by him within that county, this is a sufficient publication by the defendant to support the indictment. *Rex v. Watson*, 1 Camp. 218. Pleadings.

23. An indictment for a libel reflecting upon the prosecutor in his profession as a solicitor, and which has been sent to the prosecutor only, ought to be alleged to have been sent with intent to provoke and excite the prosecutor to a breach of the peace, and should not be alleged with intent to injure the prosecutor in his profession. *Rex v. Wegenor*, 2 Starkie, 245.

24. It is not a bar to an action for a libel, that the plaintiff has been in the habit of libelling the defendant. *Finnerty v. Tipper*, 2 Camp. 76. Defence.

### LICENCE.

A licence to *A. B. on behalf of himself and other British or neutral merchants*, to import a cargo in a vessel bearing any flag except the French, will legalize a policy of insurance on a ship belonging to an alien enemy other than a Frenchman, employed for this purpose, if the cargo is proved to belong to *British or neutral merchants*; but not otherwise, *Hagedorn v. Reid*, 3 Camp. 377. Construction.

### LIEN.

1. If goods be deposited as a security for a loan of money, such deposit constitutes something more than the right of *lien*, and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to re-imburse himself by the sale of the deposit. *Pothonier and another v. Dawson*, 1 Holt, 383. Nature of the right.

2. An issue out of Chancery on the question whether *J. S.* had, at a particular time, any *lien* on certain goods or their produce, must be found in the negative, if *J. S.* was not in possession of the goods or their produce, whatever equitable interest he might have in them. *Heywood and others v. Waring and another*, 4 Camp. 291.; *S. C.* 1 Starkie, 143.

3. Though the statute of limitations has run on a demand, yet if the creditor get possession of goods which he is entitled to hold for his general balance, he has a lien on them for the demand. *Spears v. Hartly*, 3 Esp. C. 81.

4. Liens at common law exist in cases where the creditor was obliged to receive the goods in question. *Naylor v. Mangles and another*, 1 Esp. N. P. C. 109. General rule.

5. The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of a conversion, and so is the auctioneer, who refuses to deliver it up, unless the expence incurred be first paid. *Loeschman v. Machin*, 2 Starkie, 311. Auctioneer.

6. The rule that bankers have a lien on their balance on all securities in their hands, holds where the customer has distinct accounts; Banker.  
thus

thus a discounting and a cash account; and the securities have been paid in on that account on which the balance is in favour of the customer. *Jourdain v. Lefevre and others*, 1 Esp. N. P. C. 66.

7. Where a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value. And he may recover against the acceptor of an accommodation bill (deposited with him as a collateral security before it became due), although the party who deposited the bill had it in his hands when it became due, and received satisfaction from the drawer. *Bosanquet and others v. Dunman*, 1 Starkie, 2.

8. *A.* deposits with *B.* a banker, a promissory note as a security for advances; *B.* is entitled to recover on the note, although before it became due, he parted with the possession to enable *A.* to procure payment from the maker, and although the note remained in *A.*'s hands till his bankruptcy, and then came into the possession of his assignees. *Bruce and others v. Hurley*, 1 Starkie, 23.

Bankruptcy.

9. *A.*, whilst he is solvent, and resident at *Calcutta*, directs *B.*, at *Bombay*, to remit certain proceeds to *C.* in *England*, who is in the habit of accepting bills for *A.*; this order is executed by *B.*, without fraud, but after an act of bankruptcy committed by *A.*, *C.* has a lien on the sum received for his balance. The assignees of *Jamieson v. Hodson*, 1 Starkie, 150.

Broker.

10. Where a broker has accepted bills and made advances on the property in his hands, his lien thereon can only be discharged by an indemnity against those acceptances, as well as payment of the advances; an offer of bills payable at the same time with the acceptances is not an indemnity. *Pultney v. Keyme and another*, 3 Esp. C. 182.

Calico printer.

11. Calico printers have a lien for their general balance. *Weldon v. Gould*, 3 Esp. C. 268.

Captain.

12. The captain has a lien on the cargo and freight co-extensive with his personal engagements on account of the ship; so that he may sue a consignee notwithstanding previous payment of the freight to the owners. *White v. Baring and another*, 4 Esp. C. 22.

13. The master of a ship has a lien on the luggage of a passenger for his passage money. *Wolfe v. Summers*, 2 Camp. 631.

14. The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side. *Bishop and others v. Ware*, 3 Camp. 360.

Cargo.

15. An order by *A.* to *B.*, directing the latter to pay over to *C.*, a creditor of *A.*'s, the proceeds of a cargo consigned by *A.* to *B.*, creates no lien in favour of *C.* *Heywood and others v. Waring and others*, 4 Camp. 291.; S. C. 1 Starkie, 143.

16. A ship is chartered for a particular voyage for a gross sum by way of freight. The captain signs bills of lading for the cargo, (which is the property of, and consigned to a third person), specifying a note of freight amounting to a less sum than that mentioned in the charter party. Held, that the ship owner had no lien on the cargo beyond the freight specified in the bills of lading. *Mitchell v. Scaife*, 4 Camp. 298.

17. An order by *A.* to *B.*, directing the latter to pay over to *C.*, a creditor of *A.*'s, the proceeds of a cargo consigned by *A.* to *B.*, creates no lien in favour of *C.* *Assignees of Holland, and Assignees of Humble v. —*, 1 Starkie, 143.

Deed..

18. Where title deeds are deposited as a security, equity infers an intention

intention to charge the property, and gives the party a lien on them. *Richards v. Borsett*, 3 Esp. C. 102.

19. Upon the sale of leasehold premises, the purchaser accepts bills of exchange for the purchase money; and the original lease and the assignment executed by the seller, are deposited with a third person as a collateral security, to be delivered up to the purchaser on payment of the bills. The seller, after some of the bills are paid, gets possession of the lease from the depositary, and pledges it with persons who, *bond fide*, advance money upon it, and to whom he indorses the outstanding bills. Held, that the pawnees had no lien on the lease beyond the amount of these bills. *Hooper and others v. Ramsbottom and others*, 4 Camp. 121.

20. Dyers have a lien for their general balance. *Savill v. Barchard* Dyer. and another, 4 Esp. C. 53.

21. If a man get possession of a thing by misrepresentation, he cannot retain it, as having a lien upon it; although, under the circumstances, he might have done so, had he come by it fairly. *Madden v. Kempster*, 1 Camp. 12. Fraud.

22. *A.*, a merchant, at different times employs *C.*, an insurance broker, to effect policies of insurance for him; *C.* without *A.*'s concurrence, employs *B.*, another insurance broker, to effect these policies, informing him that they were for a correspondent in the country; *B.* gets the policies effected in *A.*'s name, and delivers them all, except one, to *C.*; *C.* becomes bankrupt, without having paid *B.* any part of the premiums, and *A.* being indebted to his estate beyond the amount. Held, that *B.* had not a lien on the policy he detained for the general balance due to him from *C.*, and that *A.* could maintain trover for this policy against *B.* after tendering him the premiums and commission due in respect of it alone. *Snook v. Davidson*, 2 Camp. 218. Insurance.

23. If an agent, employed to effect an insurance on goods, represent himself as the owner of the goods to another person whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent. *Lanyon v. Blanchard*, 2 Camp. 597.

24. Insurance brokers who have effected a policy without notice that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply to the satisfaction of that balance money received upon the policy, as well after as before notice that it belongs to a third person; but if they pay the overplus received after such notice to the agent, the amount may still be recovered from them in an action for money had and received by the principal. *Mann v. Forester and another*, 4 Camp. 60.

25. If *A.* employ *B.* to effect a policy of insurance for his benefit, and *B.* without *A.*'s knowledge employ *C.* to effect the policy, representing himself to *C.* as the principal; *C.* has a lien on the policy as against *A.*, for the general balance due to him from *B.* *Westwood v. Bell and another*, 4 Camp. 349.; S. C. 1 Holt, 122.

26. The lien of a manufacturer for his general balance, extends to the property of a third person delivered by the customer with the owner's consent, but without the manufacturer's knowledge. *Weldon v. Gould*, 3 Esp. C. 268. Manufacturer.

27. An advertisement in the county paper, that persons in a particular manufactory will claim a lien on goods sent to be manufactured, is notice sufficient. *Anon.* 4 Esp. 178.



Ship.

28. A shipwright in the river *Thames* has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, credit being given by the usage of trade to the owner of the ship for the repairs. *Aliter*, where a shipwright deals for ready money. *Raitt v. Mitchell* and another, 4 Camp. 146.

29. A factor for the owner of a ship at an *English* port, requests the master to deliver the certificate of registry to him in order that he may pay the tonnage duties at the custom-house. He cannot, having thus obtained possession of the certificate, retain it as a security for the general balance due to him as factor in respect of the ship. *Burn v. Brown*, 2 Starkie, 272.

Trust.

30. An action for money had and received, will not lie to recover back a sum paid upon trust for a specific purpose, unless it be shown that the trust is closed, and that a balance remains in the hand of the trustee. *Case v. Roberts*, 1 Holt, 500.

Waiver.

31. If one having a lien upon goods, when they are demanded of him, claim to retain them upon a different ground, making no mention of lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien. *Boardman v. Sill*, 1 Camp. 410. n.

32. *A.* having repaired a carriage for *B.*, allows him to take it away from time to time; he cannot afterwards detain it for the amount of the repairs: neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice. *Hartley v. Hitchcock*, 1 Starkie, 408.

33. *A.* at *Bristol* sells goods to *B.* to be paid for by *B.*'s acceptance of a bill to be drawn by *A.*: the goods are weighed, but remain in *A.*'s warehouse, who omits to draw the bill. *B.* sells a specific and ascertained portion of these goods to *C.* in *London*, who pays for them and transmits *B.*'s order to *A.* for the delivery of them. On the fourth day after *A.*'s receipt of the order, *B.* becomes bankrupt, and then, and not before, *A.* refuses to deliver the goods to *C.*, insisting that he has a lien upon them for the price. *C.* may maintain trover against *A.*; for he was bound at all events to notify his refusal immediately. And, *semble*, that having neglected to draw the bill, and having furnished *B.* with samples to go into the market with, and having obeyed several orders of *B.*'s for the delivery of portions of the goods to different sub-vendees, he could not have insisted upon any lien, even if he had given immediate notice. *Green and another v. Haythorne and others*, 1 Starkie, 447.

34. *A.* sells to *B.* a carriage, to be paid for partly by a bill upon the delivery, and partly by a bill at a future day, and *B.* neglecting to take the carriage, *A.* obtains a verdict against him for goods bargained and sold. Until the amount is paid to *A.* he has a lien upon the carriage, and the sheriff cannot seize it under a *fi. fa.* against the goods of *B.* *Houlditch v. Desanges*, 2 Starkie, 337.

Wharfinger

35. Usage shows the terms on which parties contract. Therefore a wharfinger has a lien for his general balance, on all goods brought to his wharf, such having been the constant usage. *Naylor v. Mangles and another*, 1 Esp. N. P. C. 109.

Miscellaneous.

36. Where a sum of money has been lodged with a party to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the statute of limitations has run upon them. *Morse and others v. Williams and others*, 3 Camp. 418.

LIMIT-

## LIMITATION, STATUTE OF.

1. Where one of two joint obligers in a bond pays the whole demand, *quære* whether the limitation of his claim for contribution is six years, the same as on the bond itself? *Cole v. Saxby*, 3 Esp. C. 159. Period of limitation.
2. A debtor executes a warrant of attorney to his creditor, to confess judgment for the balance of account as then stated between them. The warrant of attorney is not a specialty, which takes the case out of the statute of limitations. *Clarke v. Figes*, 2 Starkie, 234.
3. Where there is a mutual unsettled account and reciprocal demands, the statute of limitations does not attach. For the exception in that statute as to merchants' accounts is not confined merely to persons of that description. *Cranch v. Kirkman, Peake*, 121. Commencement of its operation.
4. It seems that the limitation to an action against an attorney for so negligently registering an annuity that it was afterwards set aside, begins to run not from the registering, but the setting it aside. *Compton v. Chandless*, 4 Esp. C. 18.
5. If the captain of a ship insured barratrously carry her out of the course of the voyage, procure her to be condemned in a vice-admiralty court, sell her, and deliver her up to the purchaser, it is only from this last event that the statute of limitations begins to run as between the assured and the underwriter. *Hibbert v. Martin*, 1 Camp. 539.
6. A promissory note is made more than six years ago, and deposited with a banker, to be delivered to the payee, on his producing a certain other note cancelled; the cause of action to the payee on the first note accrues on receiving it from the banker, and is not barred either by the lapse of six years from the date, or by the bankruptcy and certificate of the maker, which intervene between the date of the note and the time of its delivery to the payee. *Savage v. Aldren*, 2 Starkie, 232.
7. If a bill filed against an attorney in vocation be entitled of the preceding term, and the defendant plead the statute of limitations; he may show when it was in fact filed. *Snell v. Phillips, Peake*, 209. How saved.
8. Where neutral debts are contracted between *A.* and *B.* much about the same time, and *A.* secures his demand from the operation of the statute of limitations by suing out process, this likewise will save its operation upon *B.*'s demand, so as to enable him to set it off against that of *A.* *Ord v. Ruspini*, 2 Esp. C. 569.
9. The defendant saying to the plaintiff, "What an extravagant bill you have delivered me!" is a sufficient acknowledgment to avoid the statute of limitations. *Lawrence v. Worrall, Peake*, 93. What shall be a waiver of the statute.
10. To take a demand out of the statute of limitations, a general acknowledgment of a debt not specifically applying to the one in question is, *prima facie*, sufficient; if not that, but another demand were intended, the *onus* of proof lies upon the defendant. *Baillie and another v. Lord Inchiquin*, 1 Esp. C. 435.
11. An acknowledgment by an agent employed in the particular affair is sufficient to supersede the statute of limitations. *Palethorp v. Furnish*, 2 Esp. C. 511. n.
12. An acknowledgment by one of two persons, on whose joint account money has been paid, takes the case out of the statute of limitations as to both. *Clarke v. Bradshaw and another*, 3 Esp. C. 155.

13. Any acknowledgment that the demand is owing, will take it out of the statute of limitations; thus an acknowledgment of a loan accompanied by an assertion that the party was discharged by the statute. *Clarke v. Bradshaw* and another, 3 Esp. C. 157.

14. An acknowledgment to a third person, though not authorized to demand payment, will supersede the statute of limitations. *Peters v. Brown*, 4 Esp. C. 46.

15. An acknowledgment of the debt, though accompanied with a declaration by the defendant, "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," is sufficient to take the case out of the statute of limitations. *Bryan v. Horseman*, 5 Esp. C. 8., S. C. 4 East, 599.

16. Where a debtor refers his creditor to a third person, the acknowledgment of that person will supersede the statute of limitations. *Burt v. Palmer*, 5 Esp. C. 145.

17. An admission of a debt relying on a written instrument as having discharged it, but which proves to be no discharge in law, saves the operation of the statute of limitations. *Partington v. Butcher*, 6 Esp. C. 66.

18. In an action against a husband, for goods supplied to his wife, for her accommodation, while he occasionally visited her, a letter written by the wife, acknowledging the debt within six years, is admissible evidence to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. 394.

19. In an action against *A.*, on the joint and several promissory notes of himself and *B.* to take the case out of the statute of limitations, it is enough to give in evidence a letter written by *A.* to *B.* within the six years, desiring him to settle the money. *Halliday v. Ward*, 3 Camp. 32.

20. Demand being made by a seaman on the owner of a ship for wages, which had accrued during an embargo, he said, if others paid he should do the same. Held, that this was a sufficient acknowledgment to take the case out of the statute of limitations. *Loweth v. Fothergill*, 4 Camp. 185.

21. A promise by a defendant to pay a debt by instalments, when he is able, is sufficient to take a case out of the statute of limitations, without proof of time being given, or of the ability of the party. *Thompson v. Osborne*, 2 Starkie, 98.

22. The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the statute of limitations, in an action against the husband. *Anderson v. Sander-son*, 1 Holt, 591.

What not.

23. A promise by which a demand discharged by laches or effluxion of time, may be revived, must be voluntary, and not extorted by the terror of an arrest. *Rouse v. Redwood*, 1 Esp. N. P. C. 155.

24. An answer to a demand of payment, that the bill had been paid, and a receipt taken, which the party would (but did not) show, will not supersede the statute of limitations. *Birk v. Guy*, 4 Esp. C. 184.

25. If a cause of action arising from the breach of a contract, to do an act at a specific time, be once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of the statute. *Boydell v. Drummond*, 2 Camp. 160.

26. A qualified admission by a party who relies on an objection which would at any time have been a good defence to the action, does

does not take a case out of the statute of limitations. As where the drawer of a foreign bill said to the indorsee, "If you had presented the protest the same as the rest, it would have been paid. I had then funds in the acceptor's hands." *De la Torre v. Barclay* and another, 1 Starkie, 7.

27. In order to take a case out of the statute of limitations in an action on a promissory note, it is not sufficient to show a payment by a joint maker of the note to the payee within six years, so as to throw it upon the defendant to show that the payment was not made on account of the note. An acknowledgment by one partner to find another, in such case, must be clear and explicit. *Holme v. Green*, 1 Starkie, 488.

28. *A.* is applied to by the attorney of *B.* for the payment of a debt. He writes in answer, "that he will wait on the defendant, when he shall be able to satisfy him respecting the misunderstanding which had occurred between them." Held, that this was no such acknowledgment of a debt as would bar a plea of the statute of limitations; and that such evidence ought not to be left to a jury, as grounds to infer a new promise to pay. *Craig v. Cox*, 1 Holt, 380.

## LONDON.

It is not a breach of the bond of a broker in the city of *London*, to act as a broker concurrently with another. The Mayor, &c. of *London v. Brandon*, 2 Starkie, 14. Broker.

## LONDON DOCK COMPANY.

1. *A.* directs the *London Dock Company* to deliver a quantity of hides belonging to him in their custody to *B.*, (supposing that *B.* had purchased them from him;) the Dock Company deliver them upon an order purporting to be the order of *B.*; but which is a mere forgery, *B.* in fact not having purchased the goods. The Dock Company are liable to *A.*, although he neglected to apply to *B.* till four months afterwards, when the supposed time of credit expired. And although *A.* might, after discovering the fraud, have recovered possession of his hides from another person. *Lubbock and others v. Inglis*, 1 Starkie, 104. Liability of.

2. The *London Dock Company* are liable for the negligence of their servants in unloading goods, although the Company derive no profit from their labour. *Gibson v. Inglis, Esq.* 4 Camp. 72. Servants of.

## LOTTERY.

1. In an action be insuring tickets in the *Irish* lottery, the act of parliament establishing such lottery must be proved. *Williams qui tam v. Pulley, Peake*, 51. Insurance.

2. If several tickets in the lottery be insured at the same time, it makes but one offence. *Holland v. Duffin, Peake*, 58.

3. In a *qui tam* action on the lottery act, the plaintiff cannot recover

cover penalties for a greater number of offences than are sworn to in the affidavit. *Phillips v. Mendez da Costa*, 1 Esp. N. P. C. 34.

4. The offence of insuring lottery tickets is complete, though no premium is given; therefore evidence that a premium was paid for such insurance, will support a count making no mention of the fact. *Phillips v. Mendez da Costa*, 1 Esp. F. P. C. 60.

5. Premiums paid for insurance in the lottery are not recoverable back, since the assured is in *pari delicto* with the insurer. *Drummond v. Decy*, 1 Esp. C. 152.

6. If *A.* pay premiums to *B.* for his insurance of lottery tickets, part of which *B.* pays to *C.* for a re-assurance, unless a privity between *A.* and *C.* can be established, as by proving that *B.* merely acted as *C.*'s agent, and not on his own account, *A.* cannot sue *C.* to recover back his money. *King v. Scrape*, 1 Esp. C. 432.

## LUNACY.

Statutes.

A person put in to superintend an unlicensed house for the reception of lunatics, is liable to the penalties of 14 Geo. 3. c. 49. without having any share in the profits of the establishment. *Budd v. Foulks*, 3 Camp. 404.

## MAIL.

Robbery.

The horse mail bags being left by the mail rider after he had taken possession of them for a temporary purpose for two minutes, were stolen during his absence; the case is within the stat. 52 Geo. 3. c. 143. s. 3. *Rex v. Robinson*, 2 Starkie, 485.

## MALICIOUS ARREST.

What is not.

1. An action cannot be maintained for a malicious arrest by *A.* against *B.*, if *A.* owed *B.* the sum for which he was held to bail, although *B.* was indebted to *A.* to a larger amount. *Brown v. Pigeon*, 2 Camp. 594.

2. *A.* by mistake sues out a bailable writ against *B.*, and gives it to *C.*, an officer, to be executed. *C.* says to *B.* he has a writ against him, but *B.* denying that he owed the money, *C.* does not take him into actual custody. On inquiry, the mistake is discovered, and *B.* is told he need give himself no farther trouble in the matter. However, he afterwards puts in bail above and incurs an expence of 1*l.* Held, that he could not maintain an action against *A.* for malicious arrest. *Bieton v. Burridge*, 3 Camp. 139.

3. A plaintiff who acting under what he conceives to be sound advice, takes the defendant in execution, after he has taken the defendant's bail in execution, is not liable to an action for maliciously arresting the defendant, although previous to the arrest, he had notice from the defendant that his proceeding was illegal. *Snow v. Allen*, 1 Starkie, 502.

Evidence.

4. In an action for a malicious arrest, the plaintiff must prove the sheriff's warrant on the writ against him. *Lloyd v. Harris*, Peake, 174.

MALICIOUS

## MALICIOUS PROSECUTION.

1. If *A.* strike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an assault, the bare fact of *A.* having struck the first blow, is not sufficient to support an action for a malicious prosecution. *Fish v. Scot, Peake, 135.* What is not.

2. If the jury deliberate before they acquit the prisoner, though he call no witnesses, a probable cause for the prosecution must be inferred. *Smith v. M'Donald, 3 Esp. C. 7.*

## MANOR.

There may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of court roll, and inclosed in exclusion of persons having rights of common. *Boulcott v. Winnill, 2 Camp. 261.* Custom.

## MARRIAGE.

1. The form of words prescribed by the rubrick for the publication of banns, need not be precisely followed, this part of the act of parliament being merely directory. *Standen v. Standen, Peake, 35.* Banns.

2. The registration of a marriage is not necessary to its validity. *Read v. Passer, 1 Esp. C. 214. Peake, 232.* Registration.

3. In civil actions, except in an action for *crim. con.*, cohabitation, acknowledgment, and reception by the family, are evidence of marriage without producing a copy of the register. *Read v. Passer, 1 Esp. C. 214.; Leader v. Barry, Id. 353.* Proof of.

4. In an action against a woman for a breach of promise of marriage, it is a sufficient justification for non-performance, if the person, to whom she has given the promise, turn out upon inquiry to be a man of bad character; but mere accusation and suspicion are not sufficient. The charges which she makes against him must, if capable of proof, be substantiated; or they go only to the damages. *Baddeley v. Mortlock and wife, 1 Holt, 151.* Promise of.

## MASTER AND SERVANT.

1. To maintain an action for assaulting plaintiff's infant son *per quod*, &c., proof of his living under his father's roof is sufficient evidence of service. *Jones v. Brown, Peake, 233.* Relation of.

2. The relation between the manager of a theatre and a performer, is not sufficient to enable him to sue for the loss of the performer's services in consequence of a battery. *Taylor v. Neri, 1 Esp. C. 386.*

3. One who serves another with a view to a bequest at the death, is not entitled to remuneration; and whether the service was with that view is a question for the jury. *Le Sage v. Coussmaker and others, 1 Esp. N. P. C. 187.* Wages.

4. A slave who continues with his master after his arrival in England is not entitled to wages without a promise, and then only for the

the time subsequent to the promise, not being retrospective. *Alfred v. Marquis of Fitzjames*, 3 Esp. C. 3.

5. A servant discharged without warning, is entitled to a month's wages. *Robinson v. Hindman*, 3 Esp. C. 235.

6. Where a servant is hired by the quarter, if he is discharged by his master without sufficient cause in the middle of a quarter, he may recover the quarter's wages. *Gandell v. Pontigny*, 4 Camp. 375. S. C. 1 Starkie, 198.

7. If a servant for a year refuse to obey his master's orders, the master is justified in dismissing him before the end of the year, and the servant cannot recover any wages. *Spain v. Arnott*, 2 Starkie, 256.

**Sickness.**

8. A master is liable for medicines and attendance furnished to a household servant. *Scarman v. Castell*, 1 Esp. C. 270.

9. A master is not liable upon an implied assumpsit to pay for medical attendance on a servant procured by the overseers of a parish, in which the servant has met with an accident in the course of his employ. *Newby v. Wiltshire*, 2 Esp. C. 739.

**Property acquired by servant.**

10. If *A.* while employed as master of a ship, of which *B.* is owner, give part of his personal services to *C.* for a stipulated sum, and *C.* pay this into the hands of *B.*, an action to recover it cannot be supported against *B.* at the suit of *A.* *Thompson v. Havelock*, 1 Camp. 527.

**Contract by servant, when binding upon master.**

11. If when a master gives his servant money to buy meat for the use of the family, the servant, instead of paying ready money, order the meat on credit, and embezzle the money, the master is not liable. *Stubbing v. Heintz, Peake*, 47.

12. Where articles taken up by a servant for his master come to his use, the master is liable to the tradesman, though the servant had previously agreed to furnish them, unless the tradesman knew of the agreement. *Precious v. Abel*, 1 Esp. C. 350.

13. Where a master has once sent his servant to take up goods on trust, he will be liable for future *bond fide* credit obtained by the servant with the same tradesman, unless due notice not to trust is given; which notice, after dealing with a tradesman personally, must be given to the tradesman himself (acting in his business) not his servant. *Gratland v. Freeman*, 3 Esp. C. 85.

14. Where a master regularly pays for a definite quantity of provisions furnished to the family, he is not liable for any excess, without proof that it was furnished by his orders. *Pearce v. Rogers*, 3 Esp. C. 214.

15. A master is not liable to a tradesman employed by his servant in repairing his property, where neither had the servant authority to employ him, nor the tradesman grounds for presuming that he had. *Hiscox v. Greenwood*, 4 Esp. C. 174.

16. Where a master has once sent his servant to take up goods on trust, he will be liable as well for those as for future *bond fide* credit obtained by the servant with the same tradesman, though he had money from his master to pay for them. *Rusby v. Scarlett*, 5 Esp. C. 76.

17. A master is not responsible for liquors ordered by his butler in the name of the master, but without his authority, unless he has on former occasions paid for goods ordered by him, or there is some other evidence to show that the butler had authority for what he did. *Maunder and another v. Conyees*, 2 Stark. 231.

18. The act of the servant will not bind the master in actions of tort

*tort*, to the same extent as in actions in contracts. *Harding v. Greening*, 1 Holt, 531.

19. No legal obligation is imposed upon a master to give his servant a character; therefore no action lies for his refusing. *Carrol v. Bird*, 3 Esp. C. 201. Character.

20. An action by a servant against his master for a false character, whereby he lost a place, cannot be maintained, if the party demanding his character did it with a view to an action against the master. *King v. Waring and wife*, 5 Esp. C. 14.

21. A master may be indicted for his servant's misconduct done in the ordinary course of his employment, though contrary to his orders: as, where those employed by the proprietor of a newspaper to conduct it, insert a libel therein. *Rex v. Walter*, 3 Esp. C. 21. Indictment against master for servant's misconduct.

22. A servant intending at the expiration of his service to set up for himself in the same line with his master, is not prohibited soliciting the support of his master's customers in that event. *Nichol and another v. Martyn*, 2 Esp. C. 732. Miscellaneous.

23. It is not actionable to induce a servant not to continue in his master's service beyond his time. *Nichol and another v. Martyn*, 2 Esp. C. 732.

## MAXIMS.

A party may object to the manner of doing an act if it multiplies his proofs. *Core v. Callaway*, 1 Esp. N. P. C. 115. Mode or form.

## MAYHEM.

1. It is not an offence within the clause of *Lord Ellenborough's Act* 43 G. 3. c. 58., against maliciously cutting with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to any notification being made to him of the purpose for which he was laid hold of. *Rex v. Rickets*, 3 Camp. 68. Statute.

2. In order to bring an offender within the clause of the statute 43 G. 3. c. 58. s. 1., for stabbing with intent to resist a lawful apprehension by a private person, for cutting a third person, it is essential that the person apprehending should have been present at the commission of the offence, or that he should be armed with the authority of a warrant. *Rex v. Dyson*, 1 Starkie, 246.

3. *Seemle*, the words "some other grievous bodily harm" in the statute 43 G. 3. c. 58., must be construed to extend to such wounds only as are inflicted upon a vital part in the body. *Rex v. Akenhead*, 1 Holt, 469.

4. In an indictment under *Lord Ellenborough's Act*, for cutting and maiming a sheriff's officer, it is incumbent on the prosecutor not only to produce the warrant made out by the sheriff to the officer, but likewise the writ. *Rex v. Meade*, 1 Holt, 593.

## MESNE PROFITS.

When the judgment in the ejectment has been against the casual ejector for want of appearance, the costs of the ejectment  
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may be included in the damages given in the action for mesne profits. But where the ejectment was regularly defended, the taxed costs only can be included. *Doe v. Davis*, 1 Esp. C. 357.

### MORTGAGE.

Mortgagee.

Held, that the mortgagee of premises was liable to the vendor for the price of timber sold to, but not paid for, by the mortgagor, and which the mortgagee had worked up in the buildings thereon, notwithstanding the mortgage is afterwards rescinded from an antecedent act of bankruptcy by the mortgagor. *Williams v. Shaw*, 1 Esp. N. P. C. 93.

### MURDER.

In resisting process.

In order to make the killing a bailiff, in resisting the execution of mesne process in a civil action, amount to murder, it seems to be necessary to prove the writ, as well as the sheriff's warrant to the bailiff; and such homicide will not amount to murder if the bailiff attempt to execute a writ without a *non omittas* clause within an exclusive liberty. *Rex v. Mead and another*, 2 Starkie, 205.

### NAVAL STORES.

Witness.

If an information against one on statute 17 G. 2. c. 40. s. 10., for having naval stores in his possession contrary to statute 9 & 10 W. 3. c. 41., appear to have been filed in consequence of a discovery on a search by a police-officer, the officer must be deemed an informer within the statute, and being entitled to a moiety of the penalty, is therefore an incompetent witness for the crown. *Rex v. Blackman*, 1 Esp. N. P. C. 95.

### NEWSPAPER.

Editor.

The compiler and manager of a newspaper is the *editor*, notwithstanding the proprietor revises it. *Heriot v. Stuart*, 1 Esp. C. 438.

### NEW TRIAL.

In penal actions.

In a penal action, where there has been a verdict for the defendant, the court will not grant a new trial, except for a misdirection of the judge. *Brooke q. t. v. Middleton*, 1 Camp. 450. •

### NUISANCE.

Public.

1. The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck; and it is not enough to station a watchman near the spot to point out the danger. *Harmond v. Pearson*, 1 Camp. 515.

2. A

2. A man setting up a noxious business in a neighbourhood where such business has long been carried on, is not indictable for a nuisance, unless the noxious vapour is much increased by his manufacture. *Rex v. Neville, Peake*, 91.

3. The owner of a vessel sunk by accident in a navigable river is not indictable for not removing it. *Rex v. Watts*, 2 Esp. C. 675.

4. The owners of booths in a fair or market, held for more than twenty years past, though not acquiesced in, are not indictable as for a nuisance. *Rex v. Smith and another*, 4 Esp. C. 111.

5. The proprietor of an oven for burning coke was indicted for a nuisance; it appeared that the health of the neighbourhood was not thereby impaired, though the vapour was offensive, nor were the dwellings rendered uncomfortable or untenable: held, that it was not an indictable nuisance. *Rex v. Davey and another*, 5 Esp. C. 217.

6. An action will not lie for a nuisance prejudicial, not to the neighbourhood, but two or three individuals only; thus, against a tinman for exercising his trade to the disturbance of two or three neighbours. *Rex v. Lloyd*, 4 Esp. C. 200. Private.

7. An action for a nuisance to a house cannot be maintained for that which was no nuisance to the house before a new window was opened in it by the plaintiff, and which becomes a nuisance only by that act. *Laurence v. Obee*, 3 Camp. 514.

8. It is universally the duty of the occupier of a house having an area fronting a public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened. *Coupland v. Hardingham*, 3 Camp. 398. Who liable for.

## OFFICERS.

1. A public officer cannot qualify the duty, or limit the responsibility which the law has annexed to his office. *Hide v. The Trent and Mersey Navigation Company*, 1 Esp. N. P. C. 36. Liability of.

2. An excise officer executing a warrant under statute 10 G. 1. c. 10. s. 13. is not liable to an action, though his search is unsuccessful, unless his information upon which the warrant was obtained was malicious and without probable cause; and even then only to an action upon the case, not of trespass. *Cooper and another v. Booth*, 3 Esp. C. 135.

3. Custom-house officers are not protected against the owner in seizing or in searching for goods as smuggled, unless the goods turn out to be smuggled. *Rex v. Akers*, 6 Esp. C. 126. n.

4. The keeper of a prisoner who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting *bond fide*, and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action of trespass and false imprisonment, if, by the mistake of the officer to whom it is directed, it was executed against another. *Aaron v. Alexander*, 3 Camp. 35.

## OVERSEERS.

Duty and  
liability.

1. Parish officers are bound to provide for casual poor; and if a third person afford relief under the pressure of immediate want, he may sue them for remuneration. *Simmons v. Wilmott and others*, 3 Esp. C. 91.

2. An action lies to recover back money paid to parish officers by a person taken up under a warrant as the putative father of a bastard child, by way of bargain with the parish to be released from all liability respecting the child, against those who received the money; although before the commencement of the action they may have gone out of office, and accounted with their successors for so much of the money as was not expended on the child and its mother during her lying-in. However, in such action, the plaintiff is only entitled to recover the surplus, after these charges have been deducted. *Townson v. Wilson*, 1 Camp. 396.

3. So, though the putative father pays the money not under duress, but under a mistake of law, it may be recovered back. *Anonymous (Stainsforth v. Staggs)*, 1 Camp. 398. n. 564 n. 3.

Statute.

4. One who is employed at a yearly salary under the appellation of accountant and treasurer to the overseers of a township, whose duty it is to receive all moneys receivable or payable by them, is a clerk and servant within the statute 39 G. 3. c. 85. *Rex v. Squire*, 2 Starkie, 349.

Action by.

5. All the overseers of the poor must join as co-plaintiffs, when suing as such, or those who sue alone will be non-suited. *Newby v. Wiltshire*, 2 Esp. C. 739.

## PARENT AND CHILD.

Obligation to  
provide for chil-  
dren.

1. A parent is liable for necessaries, but not superfluities, furnished to his child otherwise unprovided for. *Simpson v. Robertson*, 1 Esp. N. P. C. 17.

2. A parent is bound to provide for his infant; and on neglecting this duty, will be liable to one who furnishes the child with necessaries; *secus*, where he pays him (having discretion) an adequate allowance to provide them. *Crantz v. Gill*, 2 Esp. C. 471.

3. Goods are supplied to a minor upon a fraudulent representation by his father, that he is about to relinquish his business in favour of the son; although the credit is given to the son, yet the father dealing with the proceeds, is liable in assumpsit for goods sold and delivered. *Biddle and another v. Levy*, 1 Starkie, 20.

## PARTICULAR OF DEMAND.

When demand-  
able.

1. In an action of money had and received, at the suit of a purchaser against the vendor of an estate, to recover back the deposit, the conditions of sale not being complied with, the defendant, by a judge's order, may obtain a particular of the grounds on which the plaintiff seeks to recover back the deposit; to which the latter will be confined at the trial. But if there has been no particular, the plaintiff may entitle himself to a verdict by proving an infraction of the conditions of sale, never before mentioned to the defendant. *Squire v. Tod*, 1 Camp. 293.

2. If

2. If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it be drawn up, it is sufficient. *Form of.*  
*Day v. Bower*, 1 Camp. 69. n.

3. A particular of demand should specify the credits, if any, which the party means to allow. *Mitchell v. Wright*, 1 Esp. C. 280.

4. Where an action is brought to recover the balance of an account, a particular of the plaintiff's demand delivered under a judge's order, ought to give the defendant credit for payments admitted to have been made by him, and to state the exact sum which the plaintiff goes for. *Addington v. Appleton*, 2 Camp. 430.

5. The defendant cannot make at the trial of the cause any such objection to the particulars, which, if made earlier, the plaintiff or the court might have rectified. *Lovelock v. Cheveley*, 1 Holt, 552.

6. If the plaintiff's demand is stated in his bill of particulars to be for goods sold and delivered to the defendant, evidence of goods sold by the defendant, as agent for the plaintiff, is inadmissible. *Holland v. Hopkins*, 3 Esp. 168; S. C.; 2 B. and P. 243.

7. Where a bill or note, being void for want of a stamp, the payee seeks to recover on the original consideration, he is precluded so doing by describing his demand in a particular, as arising on the instrument. *Wade v. Beasley*, 4 Esp. C. 7.

8. Interest is recoverable under a particular demanding the principal. *Blake v. Lawrence*, 4 Esp. C. 147.

9. If the plaintiff obtain an order for the particulars of the defendant's sett-off, and upon an application to the defendant's attorney to deliver a particular under the order, he refers to another already delivered by his client, he is not obliged to deliver a fresh particular. *Hatchet v. Marshall, Peake*, 172.

10. It seems that where an action is maintainable without a previous demand, the plaintiff is not limited by a particular delivered before action brought; at least where he afterwards gives a different one under a judge's order. *Short v. Edwards*, 1 Esp. C. 374. Whether con-  
clusive.

11. Although the plaintiff, after delivering a particular of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that appears to be due to him. *Hurst v. Watkis*, 1 Camp. 68.

## PARTNERSHIP.

1. Where two not partners hold themselves out as such, each clothes the other with those privileges of binding the firm, which real partners are usually invested with. *De Berkorn v. Smith*, and another, 1 Esp. N. P. C. 31. Who are  
ners.

2. Where a partner has retired, but his name is not withdrawn, he is liable as a partner, unless due notice has been given, or the creditor knew that he had retired. *Parkin v. Carruthers and another*, 3 Esp. C. 248.

3. If there is an agreement between *A.*, the sole owner of a lighter, and *B.*, a lighterman, that *B.* shall work the lighter, and that the net profits made by her shall be equally divided between them; *A.* and *B.* are partners in this concern, and *B.*, as well as *A.*, is liable for repairs done to the lighter. But if the agreement between them is, that *B.*, in consideration of working the lighter, shall have half her gross earnings, this does not constitute a partnership, being only a mode of paying *B.* for his labour. *Dry v. Boswell*, 1 Camp. 329.

4. A father establishes a business; on his son's coming of age, tells him he shall have a share in it, and holds him out to the world as his co-partner. The son acts as such for several years; but there is never any thing settled as to the particular share which he shall have. Under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers; but not that the son is entitled to a moiety of the profits; and it will be referred to a jury to say, to what share he is reasonably entitled. *Peacock v. Peacock*, 2 Camp. 45.

5. If persons separately interested in aliquot parts of a ship employ a joint agent, they are liable in the aggregate. *Pasmore v. Bousfield*, 1 Starkie, 296.

6. *A.* and *B.* are partners in the business of public carriers, and a contract between them. *A.* finds horses and drivers for certain stages, and *B.* supplies them for the remaining stages. They are, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance. And it is no defence to *B.* that the servant, by whom the injury is committed, was the *special servant* of *A.*, and hired and paid by *A.* alone. *Weyland v. Elkins*, 1 Holt, 227.; S.C. 1 Starkie, 272.

Who not.

7. Third persons have no right to infer that two are general partners from their appearing as partners in a particular transaction. *De Berkon v. Smith* and another, 1 Esp. N.P.C. 29.

8. Where the profits arising from the sale of the cargo are to be divided in certain proportions in lieu of wages between the crew, including the captain, the different parties are not partners, so that each may sue the captain for his share. *Wilkinson v. Frasier*, 4 Esp. C. 182.

9. Where there was a stipulation between *A.*, *B.* and *C.* who appeared to the world as co-partners, that *C.* should not participate in the profit and loss, and should not be liable as a partner, held, that *C.* was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership. *Alderson v. Pope*, 1 Camp. 404. n.

10. If *A.* purchase bullocks, and put them to depasture on *B.*'s ground, it being agreed that the profits upon a re-sale above the prime cost should be equally divided, this does not constitute a partnership as to the bullocks, and upon a re-sale, *A.* may maintain an action for the price of them in his own name. *Wish v. Small*, 1 Camp. 331. n.

11. There is an agreement between *A.*, *B.* and *C.*, the proprietors of a stage coach, who divide the general profits of the concern, that they shall each work the coach a stage with horses, their separate property, and maintained respectively at their separate expence. Held at N.P., that *B.* and *C.* were jointly liable as co-partners with *A.* for the price of hay furnished at *A.*'s request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him under the agreement. *Barton v. Harrison*, 2 Camp. 97. Overruled by the court of C. P. who granted a new trial, 2 Taunt 49.

Dormant.

12. A dormant partner need not be joined as a co-plaintiff. *Leveck and another v. Shaftoe*, 2 Esp. C. 468.

13. A dormant partner is liable so long only as he shares in the profits, unless it was known to the creditor that he was a partner when due notice that he has withdrawn must be given. *Evans v. Drummond*, 4 Esp. C. 89.

14. If several persons trade under a particular firm, and some without the concurrence of others, draw bills under that firm, all are liable to an indorsee. *Baker v. Charlton, Peake*, 80.

When the act of one partner shall bind the rest.

15. One partner may bind the other by borrowing money in the way of their trade, even though he applies it to his own use, since the liability of a contract depends upon the state of things when concluded. *Rothwell v. Humphreys* and another, 1 Esp. C. 406.

16. Where a creditor fraudulently takes the partnership acceptance for his separate debt, it is available in the hands of a *bond fide* holder, though not in his own. *Wells v. Masterman* and another, 2 Esp. C. 731.

17. Where one or two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties. *Bond v. Gibson*, 1 Camp. 185.

18. If *A. B.* and *C.* are in partnership, and *A.* draws a promissory note, by which he promises individually to pay the money, and which he signed in his own name only, but prefixing to his signature, "for *A. C.* and *B.*" this binds the whole partnership, *Lord Galway v. Matthew*, 1 Camp. 403.

19. Where one of several partners, with the privity of the others, draws bills of exchange in his own name, upon the partnership firm, in favour of persons who advance him the amount, which he applies to the use of the partnership, although the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent. *Denton and others v. Rodie and another*, 3 Campbell, 493.

20. Where *A.* being member of a partnership consisting of several individuals drew a bill of exchange in blank in the partnership firm, payable to their order; and having likewise indorsed it in the partnership firm, delivered it to a clerk to be filled up for the use of the partnership, as the exigencies of business might require, according to a course of dealing in other instances; and after *A.*'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to *A.*'s death, and sent it into circulation: held, that the surviving partners were liable as drawers of the bill to a *bond fide* indorsee for value, although no part of the value came to their hands. *Usher and another v. Dauncey and others*, 4 Campbell, 97.

21. After the dissolution of partnership between *A.* and *B.* and the advertisement of it in the Gazette, *A.* accepts a bill bearing date previous to the dissolution for the accommodation of a third person who indorsed it for value. *B.* who permits his name to remain over the shop in the Poultry as a member of the firm till after the dissolution of partnership, and notice of it, and indorsement of the bill, is liable as a partner to a *bond fide* holder. *Williams and another v. Heats and another*, 2 Stark. 290.

22. If a partner who executes a charter party by the terms of the instrument in the commencement of it, professes to contract for himself and his partner *R.*, *A.* will be bound, although all the stipulations and obligations in the remaining part of instrument are made in the name of the said freighter. *Thomas v. Clarke and Todd*, 2 Stark. 451.

23. *A. B.* and *C.* are part owners in a ship. *A.* directs *B.* and *C.* not to order any repairs in their joint names, and informs them

that he will no longer consider them as managing owners. Repairs were done in their joint names upon the direction of the captain employed by *B.* and *C.* Held, that *A.* was jointly liable. *Gleadon v. Tinkler*, 1 Holt, 586.

24. A pledge by one partner of partnership's property will bind his copartner, although the pledge is made without their privacy and consent, provided the pledgee had no notice that the property was joint property, and there be no fraud in the transaction. *Raba v. Ryland*, 1 Gow. p. 132.

When not.

25. A partnership may be confined to an individual concern, when one partner can only bind the other in relation to it. *De Bertom v. Smith*, 1 Esp. C. 29.

26. Where a creditor, when he trusts a partner contracting on behalf of the firm, knows that he is acting without authority, the firm is not answerable. *Arden v. Sharpe* and another, 2 Esp. C. 524.

27. On a dissolution of partnership, the partners become distinct persons, so that one cannot, without authority, by indorsing the name of the firm, transfer partnership securities existing before the dissolution, nor are the others liable, though the proceeds are applied in liquidation of the partnership debts. An authority given by the firm to one to settle the partnership affairs, does not authorize such indorsement. *Abel and another v. Sutton*, 3 Esp. C. 108.

28. The *bond fide* indorsee for valuable consideration of a bill accepted without authority by one partner in name of the firm, cannot sue the firm therein. *Williams v. Thomas and others*, 6 Esp. C. 18.

29. If a bill of exchange is drawn upon a firm, and one of the partners accepts it in his own name, this acceptance binds the copartnership. *Mason v. Ramsay*, 1 Camp. 384.

30. If *A.* and *B.* are in partnership, and *C.* owes them a sum of money on the partnership account, a receipt for this given by *A.* upon setting off a private debt due from himself to *C.* will be a bar to an action by *A.* and *B.* against *C.* for the debt due to the partnership; but if, after a dissolution of partnership between *A.* and *B.*, and a notice in the Gazette that all debts due to the partnership shall be paid to *B.*, *A.* collusively gives *C.* a receipt for the debt, dated anterior to the dissolution of the partnership, the receipt is void, and an action may still be maintained against *C.* for the debt, in the names of *A.* and *B.* *Henderson v. Wild*, 2 Camp. 561.

31. If after a dissolution of partnership, and notice of this published in the London Gazette, and sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership. *Newsome v. Coles*, 2 Camp. 617.

32. After the actual dissolution of a partnership between *A.* and *B.*, *A.* accepts a bill in the name of the partnership, bearing date before the dissolution; an indorsee who takes the bill without notice of the dissolution, cannot enforce the bill against *B.* *Wrightson and another v. Pullan and another*, 1 Stark. 375.

33. One co-partner cannot bind another by drawing a bill in the name of the firm, for the discharge of his own private debt, without the knowledge of his co-partner; and this defence may be set up by the latter in an action by the indorsee of the bill, without giving any notice of his intention to dispute the consideration. *Green v. Deakin and others*, 2 Stark. 347.

34. By taking the separate bill of one partner in lieu of the partnership acceptance due, the partnership are discharged. *Evans v. Drummond*, 4 Esp. C. 31. Payment.

35. If a tradesman having furnished a ship, owned by several with stores, settles with one part-owner upon the footing of a sole responsibility, as by taking his separate bill for the amount, the others are thereby discharged, *Reed v. White and others*, 5 Esp. C. 122.

36. The plaintiff holding a bill of exchange as a security from three partners after the dissolution of the co-partnership, and after the bankruptcy of one of them, takes the notes of one of them as a collateral security, without the knowledge of the other partners, and retains the original security in his hands, this does not discharge the other partners, *Bedford v. Deckin and others*, 2 Stark. 178.

37. The assignees of a bankrupt partner, cannot recover partnership effects, retained by a third person under orders from the solvent partner. *Wood and another v. Thwaites*, 3 Esp. C. 245. Bankruptcy.

38. After a secret act of bankruptcy committed by one of two co-partners, the other cannot by an indorsement in the name of their firm, transfer negotiable securities, which existed before the act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279.

39. *A.* receiving a bill of exchange in payment for part of a lot of cattle; jointly purchased by himself and *B.*, indorses the bill to *B.*, and *B.* indorses it over; the bill is dishonoured, and *B.* promises to pay to *A.* half of the amount, if he will take it up; held, that *A.*, after taking it up, cannot maintain an action against *B.* whilst the partnership account remains unliquidated. *Robson v. Curtis*, 1 Stark. 78. Rights inter se.

40. *A.* agreed to supply *B.* with a manuscript work to be printed by *B.*, the profits of which are to be equally divided. *B.* may maintain an action at law against *A.* for refusing to supply the manuscript. For this is not an action for partnership profits, but for refusing to contribute the labour of the defendant towards the attainment of profits. It would be a good defence to such an action to show that the intended publication was of an illegal nature, but this is not to be presumed, the work itself not being produced. *Gale and another v. Leckie*, 2 Stark. 107.

41. One of several partners, as brewers, transfer the premises to *A.* who buys books, and carries on the same business there. The other partners are not entitled to the possession of these books, the contents of which do not relate to any entries anterior to *A.*'s entry. *Dove v. Wilkinson and Spurvey*, 2 Stark. 287.

42. Upon a dissolution of a partnership, and a mutual statement and settlement of accounts, there is an implied promise in law, on the part of him against whom a balance is found, to pay his co-partner; and an express promise to pay is not necessary. *Rackstraw v. Imber*, 1 Holt. 368.

43. When partners dissolve their partnership, it is incumbent on them to publish the dissolution in the Gazette, or they will all be liable to creditors who did not know of the dissolution, and delivered goods to one thinking he was dealing with all. *Gorham v. Thomson*, Peake, 42. Dissolution.

44. When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the Gazette is not sufficient to discharge them, as against those persons who have not seen it. *Graham v. Hope*, Peake, 154.

45. If a dissolution of partnership is not made known in a suitable manner, it continues on with respect to innocent third persons. *Godfrey v. Turnbull*, 1 Esp. C. 371.

46. Notice



46. Notice of a dissolution of partnership, as against all but former customers, may be by the Gazette; and against these too, if they take in that document. *Godfrey v. Turnbull and another*, 1 Esp. C. 371.

47. If a dissolution of partnership is not made known in a suitable manner, it continues on with respect to innocent third persons. *Parlin v. Carruthers and another*, 3 Esp. C. 248.

48. A change of partners in a banking house is sufficiently notified to the customers of the house by a change in the printed cheques. *Barfoot v. Dickenson*, 3 Campb. 147.

49. A partnership is commenced by articles unsealed, in which is contained an agreement for a co-partnership deed, and such partnership may at any time be dissolved by parol: and although one partner refuse to sign the deed, when tendered to him, he is not thereby precluded from recovering a balance due to him on the partnership account in an action of assumpsit. *Rackstraw v. Imber*, 1 Holt, 368.

Joinder in action.

50. A partner cannot join in a suit for a demand contracted to the firm before his admission. *Wilford and another v. Wood*, 1 Esp. N. P. C. 182.

51. If one of several partners promise individually to pay a debt, he will not be allowed to shew that it was due jointly from himself and his co-partners. *Murray v. Somerville*, 2 Camp. 99 n.

52. A merchant carrying on trade on his own separate account, introduces into his firm the name of a clerk, who has no participation in profits or loss, but continues to receive a fixed salary. Held, that in an action on a bill of exchange, payable to the order of this firm, the clerk will be joined as a plaintiff. *Guidow v. Robson*, 2 Camp. 302.

53. A father that holds out to the world that his son is his partner, and who sends bills and signs receipts in their joint names, in an action brought in his own name, is not precluded from shewing, that his son is not a partner. *Glossop v. Colman & others*, 1 Starkie, 25.

54. A part-owner of a vessel, who orders supplies on his own account, without mentioning any co-partners, cannot plead in abatement that these are co-partners who ought to have been joined, the plaintiff being ignorant that there were other part-owners. *Baldney and another v. Ritchie*, 1 Starkie, 338.

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## PARTY WALL.

Penalty.

The master builder, not the owner of the house, is liable to the penalty inflicted by st. 14 Geo. 3. c. 78. s. 67. *Meymot v. Southgate*, 3 Esp. C. 223.

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## PATENT.

Subjects of.

1. Sensible that if a patent be taken for more of a machine than is strictly the inventor's own addition or improvement, it is not good. *Hill v. Thompson*, 1 Holt, 636.

2. A patentee in the specification, sums up the principle in which his intention consists; if this principle be not new, the patent cannot be supported, although it appear, that the application of the principle, as described in the specification, is new. *Rex v. Cutber*, 1 Starkie, 354.

3. A patent is void. 1st, If the specification omits any ingredient, Specification. which, though not necessary to the composition of the thing, for which the patent is claimed, is a more expeditious and beneficial mode of producing the manufacture; and, 2dly, If, previous to the patent being granted, the article has been publicly vended (though only four months) by the patentee himself. *Wood and Son v. Zimmer and another*, 1 Holt, 58.

4. *Semble*, that a patent should be a general index to the specification, and state in substance and outline what is thereafter set out in circumstance, and detail in the specification. *Hill v. Thompson*, 1 Holt, 636.

5. In the specification of a patent for an improved instrument, it is essential to point out precisely what is new and what is old; and it is not sufficient to give a general description of the construction of the instrument, without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. *Macfarlane v. Price*, 1 Starkie, 199.

6. A patent of an improved mode of lighting cities, towns, and villages, is not supported by a specification describing an improved lamp. *Lord Cochrane v. Smethurst*, 1 Starkie, 205.

7. A brush differing from a common one in no other respect than in the circumstance that the hairs or bristles are purposely made of unequal lengths, is improperly described in a patent for a new invention, as a tapering brush. *Rex v. Metcalf*, 2 Starkie, 249.

8. A patent, dated the 10th of May, contained a proviso that a specification should be enrolled within one calendar month next, and immediately after the date thereof. The specification was inrolled on the 10th of June following. Held, that the month did not begin to run till the day after the date of the patent, and that the specification was in time. *Watson v. Pears*, 2 Camp. 294.

### PAWNBROKER.

One employed to sell goods by commission pawns them; the owners of the goods may maintain trover against the pawnbroker, after a demand and refusal, although the duplicate has not been tendered according to the statute 39 & 40 Geo. 3. c. 99. s. 5. *Peet and another v. Baxter*, 1 Starkie, 472. Redemption by the true owner.

### PAYMENT.

1. Where a debtor pays money to his creditor, who was in this case a banker, without a specific appropriation, the creditor may apply it in payment of his debt. *Hammersley and another v. Knowlys*, 2 Esp. C. 666. Appropriation of.

2. *A.* having a legal claim against *B.*, on bills of exchange accepted by *B.*, and having also possession of a deed of mortgage, executed by *B.* to a third person, of which he might compel an assignment, in equity *B.* pays money to *A.* on account, without prejudice to his claim on any securities. The law applies the payment to the bills of exchange. *Birch and another v. Tebbutt*, 2 Stark. 74.

3. Security having been given by a surety for goods to be supplied to

to his principal, and not in respect of a previously existing debt, goods are subsequently supplied, and payments are from time to time made by the principal, in respect of some of which discount is allowed for prompt payment, it is to be inferred in favour of the surety, that all these payments were intended in liquidation of the latter account. *Marryatt's v. White*, 2 Stark. 101.

Countermand-  
ing of.

4. Where by the custom of trade the money for bills given is payable at a future day, and in the interim the payee, or his agent who procured them, becomes insolvent, the drawer may countermand payment, though the agent had the money in his hands. *Puget de Bras v. Forbes* and another, 1 Esp. N. P. C. 117.

5. A. accepts a bill, made payable at the house of the defendants, which is indorsed to the plaintiffs, who discount it. The bill is presented to the defendants, when due, and dishonoured. Two days afterwards the money to take up the bill is remitted to defendants, and they are requested to follow it, in whosoever hands it may be. They tender the money to the plaintiffs, who had sent back the bill, the day before, to the drawers. Meantime the defendants receive an order from a house (to which the letter inclosing the remittance referred them for advice) to hold the money to the credit of that house, as they had, by the desire of A. the acceptor, advanced him to the amount of the money then in the defendant's hands, for the purpose of taking up the bill. Held, that this was a sufficient countermand of the money on the part of A.; and that the defendants were not liable to an action for money had and received, brought by the plaintiffs, on their again getting back the bill into their possession. *Stewart and another v. Fry and another*, 1 Holt, 372.

Rescission of.

6. A payment made under a threat to distrain, but to which the party knows that the payee is not entitled, cannot be recovered back or set off. *Knibbs v. Hall*, 1 Esp. N. P. C. 84.

7. If a party pay money demanded on a claim which he knows to be unfounded, and for which he is sued, he cannot recover it back, though he declared at the time that he would bring an action for it. *Brown v. McKinally*, 1 Esp. C. 279.

8. Where money has been paid under compulsion of legal process, which is afterwards discovered not to have been due, it cannot be recovered back. *Marriot v. Hampton*, 2 Esp. C. 546; S. C. 7. T. R. 269.

9. Money paid voluntarily, and not through mistake or compulsion, cannot be recovered back. *Cartwright v. Rowley*, 2 Esp. C. 723.

10. Where money has been paid as the consideration of a promise which the party has not the power of performing, it may be recovered back. *Richards v. Bossett*, 3 Esp. C. 102.

11. Money obtained by extortion may be recovered back, though the defendant has by the extortion incurred a penalty; hence in debt against a sheriff's officer, under statute 32 Geo. 2. c. 28. if the plaintiff's evidence on the special count is deficient, he may recover the excess beyond the lawful fee under that, for money had and received. *Lovell v. Simpson*, 3 Esp. C. 153.

12. Money voluntary paid for an illegal demand cannot be recovered back. *Dawson v. Remnant*, 6 Esp. C. 24.; *Fulham v. Down*, Id. 26. n.

13. Money paid under a mistake of fact known to the person to whom it is paid, may be recovered back; thus, money paid by the father of a bastard child, under an order of filiation, as for expences which in fact were not, nor could be incurred by the parish. *Hodgson v. Williams*, 6 Esp. C. 29.

14. If

14. If an insurance broker, when a loss happens upon a policy which he has effected, pays the assured the full amount of the money subscribed, he cannot recover back any part of it, upon the ground that before the loss happened, one of the underwriters upon the policy had become insolvent, and that he was not aware of this fact when he paid the money. *Eagar v. Beunstead*, 1 Camp. 411.

15. *A.* pays a sum of money into a banker's for a specific purpose; the banker's clerk, by mistake, pays this money to *B.* who has no right to it. Held, that *A.* cannot maintain an action against *B.* to recover it back. *Rogers v. Kelly*, 2 Camp. 123.

When not maintainable.

16. If goods are delivered generally of the sort ordered, the price cannot be recovered back in an action for money had and received as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use. *Fortune v. Lingham*, 2 Camp. 416.

17. The plaintiff having paid an attorney the amount of his bill, cannot, after a reduction of the bill by taxation, recover the difference. *Gower v. Pokin*, 2 Stark. 85.

18. Where money is advanced to *A.* as the manager of an institution, for the purpose of purchasing shares therein, and there is no proof of a misapplication of the money by him, the person advancing it cannot recover it back from *A.* on the failure of the institution. To enable the person advancing to recover from *A.*, he must show either fraud in the receipt of the money, or a misapplication of it. *Lloyd v. Sandilands*, 1 Gow. p. 13.

19. A post dated cheque is drawn upon a banker; but on the day on which it purports to have been drawn, the maker informs the holder that the banker has no funds to meet the cheque, and circumstances are disclosed to the holder, from which he must infer the probable insolvency of the maker. The holder, however, presents the cheque to the banker, and obtains payment of it; but he does not communicate to the banker, (who is wholly ignorant of all the circumstances) what had fallen within his knowledge. *Quære*, whether, under these circumstances, the holder can retain the money against the banker, who made the payment under an ignorance of the real circumstances of the case? Afterwards decided by the court that he could not retain it. *Martin v. Morgan*, 1 Gow. p. 123.

20. If the consignee, to get his goods delivered to him, pay more than the net weight amounts to, he may recover back the surplus in an action for money had and received. *Geraldes v. Donison*, 1 Holt, 346.

21. Payment of the demand after writ sued out, is no stay of proceedings, unless the costs are likewise paid. *Toms v. Powell*, 6 Esp. C. 40.

In relation to judicial proceedings.

## PEER.

A peer defendant in a criminal prosecution, is not entitled to sit covered in court, or have a place assigned to him. *Rex v. Lord Abingdon*, 1 Esp. C. 228.

Privileges of.

## PENAL ACTION.

Commencement of.

In a penal action the plaintiff is at liberty to show the action commenced within a year, as well after as before the objection, that it does not appear on the record is made. *Maugham qui tam v. Walker, Peake, 164.*

## PENALTY.

Liquidated damages.

Where a person binds himself in an agreement to pay a certain sum of money in case of a breach of the terms of it on his part, and it is therein stated "that the sum mentioned is to be considered as liquidated damages," *semble*, that in an action upon the agreement, the jury are bound to give the plaintiff the whole money; and that such sum is not to be considered as a penalty, but as damages ascertained between the parties. *Barton v. Glover, 1 Holt, 43.*

## PERJURY.

What is.

1. If an answer to a bill filed by *A.* for redemption of lands assigned to him by *B.*, the defendant swear that he had notice of the assignment, and therefore insists on taking another bond debt due from *B.* to his mortgage, this is a material fact on which perjury may be assigned. *Rex v. Pepys, Peake, 138.*

2. An indictment for perjury cannot be supported where the truth or falsehood of the fact sworn to depends upon the construction of a deed. *Rex v. Crespigny, 1 Esp. C. 286.*

3. An answer on oath (to a bill in equity), though improperly entitled, constitutes, if false, the crime of perjury. *Rex v. Roper, 1 Starkie, 531.*

Indictment.

4. If a witness who is a *Scotch* covenanter be sworn on the testament, and afterwards at the desire of the counsel according to the ceremony of his own country, he may be indicted as having sworn on the Testament. *Rex v. McCarther, Peake, 155.*

## PILOT.

Liability of.

A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct, although a superior officer is on board. *Stort v. Clements, Peake, 107.*

## POOR.

Rate.

One who occupies a house as surveyor to the navigation of the river *Lee*, under the trustees of that river, held to be liable for poor's rates, although by act of parliament the tolls, &c. are exempted from being rated, and although the trustees have no beneficial interest, but act for the public. — *v. Armstrong and others, 2 Starkie, 543.*

POST.

## POST.

A person remitting money by the post should deliver the letter at the general post-office, or a receiving-house appointed by that office, and not to a bell-man, in the street. *Hawkins v. Rutt, Peake*, 186. Remittance by.

## POWER.

An estate is settled to the use of such person, &c. as *J. B.*, shall by any writing, &c. signed, sealed, and delivered by him in the presence of two or more witnesses direct, limit, or appoint. *J. B.* may execute this power by his will, signed, sealed, and delivered in the presence of three witnesses. *Doc ex dem. Delegal and others, v. Holloway*, 1 Starkie, 431. Execution of.

## PRINCIPAL AND AGENT.

1. Merchants in *London* receive from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect insurance. They declining to do business for the consigner, but acting *bond fide* with a view to his interest, indorse the bill of lading to a friend of his, who receives the goods, and afterwards fails with the proceeds in his hands. Held, that the merchants, by indorsing the bill of lading, were liable to the consigner for the amount. *Corlett v. Gordon and another*, 3 Camp. 472. Relation of.

2. If an agent advise his principals to trust one who has been represented to him by another as a man of credit, who trust him accordingly, they cannot sue the author of the representation, if the agent knew at the time that it was false. *Cowen and another v. Simpson*, 1 Esp. C. 290. Identity of.

3. Where colonial produce is sold through the intervention of a broker, by the usage of trade in *London* (which was held to be valid), he is entitled in all instances, (if there be no express stipulation to the contrary), to half per cent. commission from the purchaser, as well as from the seller. *Eicke v. Meyer*, 3 Camp. 412. Commission.

4. By the usage of trade in *London*, a broker who acts as such in chartering a ship to the *Baltic*, is entitled to a commission of 5 per cent. upon the amount of the freight. *Cohen v. Paget*, 4 Camp. 96.

5. A factor who has been guilty of gross misconduct in selling the goods of his principal, is not entitled to deduct for commission in an action for money had and received to the use of his principal. *White v. Chapman*, 1 Starkie, 113.

6. A broker who procures a charter party for a vessel to *Rio Janiero*, where a gross sum is to be paid for the voyage out and home, is entitled on a *quantum meruit* to 5 per cent. on the gross sum, although the payment of part be contingent on the arrival of the vessel home. *Roberts and others v. Jackson and others*, 2 Starkie, 225.

7. Commission of 5 per cent. on the sum laid out allowed to a surveyor on a *quantum meruit*. *Chapman and others v. De Tastet*, 2 Starkie, 294.

8. If *A.* has been in the habit of subscribing *B.*'s name with his consent Agents' authority.

consent to policies, an authority for future subscriptions will be taken for granted. *Neal v. Erving*, 1 Esp. N. P. C.

9. If a broker is employed to make one particular purchase of goods of a certain description and price, the principal will not be bound by his contract if the broker departs from his instructions in either of those particulars. *Secus*, in the cases of a factor or general broker. *East India Company v. Hensley*, 1 Esp. N. P. C. 112.

10. Under deputation, all reasonable powers necessary to attain the end in view, may be presumed to have been given; therefore one against whom an award has been made by employing an attorney "to do what is needful in the business," authorizes his taking any steps necessary to carry the award into execution. *Dawson v. Sir Robert Lawley*, 4 Esp. C. 65.

11. An agent with discretionary powers to exceed the price named by his principal, binds the principal by so doing. *Hicks v. Hawkin*, 4 Esp. C. 114.

12. To affect an employer with a warranty made by his agent on a sale, it must be made at the time of the sale. *Helyear v. Hawke*, 5 Esp. C. 72.

13. If a master entrusts his servant to sell a horse, and gives no directions respecting the warranty, he is bound by the warranty of the servant. *Helyear v. Hawke*, 5 Esp. C. 75.

14. An agent proved to have authority to sign a policy, will be presumed to have authority to adjust it. *Richardson v. Anderson*, 1 Camp. 43. n.

15. An agent employed generally to do any act, is authorized to do it only in the usual way of business. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bond fide*, and with a view to the benefit of his principal. *Wiltshire v. Sims*, 1 Camp. 258.

16. A servant employed to sell a horse and receive the price, has an implied authority to warrant the horse to be sound; and in an action upon the warranty, it is enough to prove that it was given by the servant, without calling him, or shewing that he had any special authority for that purpose. *Alexander v. Gibson*, 2 Camp. 555.

Reference by  
agent.

17. An agent who underwrites and settles losses for another, has an implied authority from him to refer a dispute about a loss to arbitration. *Goodson and another v. Brooke*, 4 Camp. 163.

Contract by  
agent.

18. Held to be a lawful usage in the Irish provision trade, that a general authority to a broker to sell expires with the day on which it is given, and that a contract for the sale of goods afterwards entered into by the broker, is not binding on the principal. *Dickinson v. Lilwall and another*, 4 Campbell, 279.; S. C. 1 Starkie, 128.

19. A promise made by the book-keeper of a carrier at the office, to make compensation for the loss of a parcel, is not binding upon the carrier, unless the book-keeper be shown to be his general agent. *Olive v. James*, 2 Stark. 181.

20. It is not necessary that a broker should insert the name of his principal, in a contract which he makes for him. It is sufficient, if, upon demand of his contract-book, he be ready to produce it, and the name of his principal be recorded there. *Kemble and others v. Atkins and another*, 1 Holt, 427.

21. The course of dealing between the principal and the broker may authorize the latter to make contracts for the principal, in his (the broker's) own name, which will bind the principal to a performance. *Kemble and others v. Atkins and another*, 1 Holt, 427.

22. Although

22. Although a factor sells goods as a principal, yet, if before they be all delivered, and before any part of them be paid for, the purchaser be informed that they belonged to a third person; in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor. *Moore v. Clementson*, 2 Camp. 22. Contract by agent.

23. If goods be sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract. *Aliter*, where the principal is disclosed at the time of sale. *Blackburn v. Scholes*, 2 Camp. 343.

24. The circumstance of persons selling goods being described in the catalogue of sale as sworn brokers, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals. *Blackburn v. Scholes*, 2 Camp. 343.

25. Payment to the agent is payment to the principal, so as to charge him with the receipt. *Matthews v. Haydon*, 2 Esp. C. 510. Payment to agent.

26. If an agent employed to sell, receive part only of the price, the principal cannot sue for it till the transaction is closed, unless it be through the agent's fault that the whole has not been obtained; since otherwise there might be many actions brought where a single right only existed. *Vorden v. Parker*, 2 Esp. C. 710.

27. If goods be bought by a broker, the principal is liable to the vendor if called upon when payment becomes due; although he has previously paid the price of the goods to the broker. *Secus*, if the day of payment be allowed to pass by, without any demand being made upon the principal. *Heymer v. Seuvercropp*, 1 Camp. 109. 180. c.

28. If the owner of goods allow the broker, through whom he sells them, to sell them as a principal, the purchaser of goods so sold, is discharged by payment to the broker in any way which would have been sufficient, had he been the real owner. *Coates v. Lewis*, 1 Camp. 444.

29. A tender of money to an agent authorized to receive payment, is a good tender to the creditor himself. *Goodland v. Blewith*, 1 Camp. 477.

30. A payment by the vendee, of goods to the broker, is good, if the name of the principal be not disclosed, although the vendee knows that the broker sells for some unknown principal. *Campbell and another v. Hassel and another*, 1 Starkie, 233.

31. And it makes no difference in such case, whether or not the broker act under a *del credere* commission. *Ibid*.

32. But a payment in such case would not be good if it varied from the original terms of the contract. And evidence of a custom to that effect is not admissible. *Ibid*.

33. And the terms being a bill at four months, two and a half discount for ready money, prompt in fourteen days; a payment by bill at two months, deducting one and a half discount, is no payment as against the principal, although he makes no demand till after the expiration of the time of credit. *Ibid*.

34. *A.* is employed by *B.* and *Co.* as their broker; he sells goods, the property of his principals, lying in the *London Docks*, to *C.*, and draws a bill of exchange in *his own* name, which *C.* accepts for the amount, and pays. *A.* becomes a bankrupt; *B.* and *Co.* disavow the transaction, and call upon *C.* for payment; *C.* refuses to pay, alleging that he had already paid the broker, and king's trover for the



goods against *B. and Co.*, and the treasurer of the *London Docks*. Held, that inasmuch as *B. and Co.* had suffered their broker, upon some occasions, to draw bills in his own name, without mention of them as his principals, they were bound by the payment which had been made to him by *C.* in the present case: that the action will lay against *B. and Co.*, but that the treasurer was entitled to an acquittal. *Townsend and others v. Inglis and others*, 1 Holt, 278.

Deputy.

35. A demand of rent by the agent of a bailiff appointed to destrain is null; therefore proof of such demand will not support a replication of a subsequent demand and refusal to a plea of tender in-replevin. *Pimin v. Grevill*, 6 Esp. C. 95.

36. If goods be delivered to *A.*, to be sold by him in a particular place, although he be unable to sell them there, he has no right to send them elsewhere, under the care of another person in search of a market. *Catlin v. Bell*, 4 Camp. 183.

Action by agent.

37. A broker who sells to pay himself his advances on the property by order of the principal, may sue the vendee on the contract, notwithstanding the subsequent bankruptcy of the principal, and though the sale note describe the property as belonging to the principal; he may also declare generally as on a sale by himself. *Atkins and another v. Amber*, 2 Esp. C. 493.

38. A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight for them, may maintain an action in his own name for not delivering them according to the bill of lading. *Joseph and others v. Knox*, 3 Camp. 320.

Agent's rights against principal.

39. It seems that an agent may withhold the goods of his principal by proving a clear title in a third person. *Laelough v. Toule*, 3 Esp. C. 114.

40. Where a factor upon selling goods takes a security payable to himself from the purchaser, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser; if the latter become insolvent before paying his security, the factor cannot compel the principal to refund the money received by him as the price of the goods. *Simpson and another v. Swan*, 3 Camp. 291.

Agent's liability to principal.

41. Where an agent receives a remittance for his principal, he is not liable to pay interest thereon, unless he make use of it. *Rogers v. Boehen and others*, 2 Esp. C. 704.

42. If bankers pay a cancelled cheque drawn by a customer, under circumstances which ought to have excited their suspicion, and induced them to make enquiries before paying it, they cannot take credit for the amount. *Scholey v. Ramsbottom*, 2 Camp. 485.

Agent's liability to third persons.

43. Where a man is known to act merely as an agent, where the principal is known, and there is no express engagement by the agent, nor circumstances whence it may be inferred that the credit is given to him, the rule is that the agent, though the person immediately making the contract, is not personally liable. *Owen v. Gooch*, 2 Esp. C. 567.

44. Though in general the title of the principal cannot be tried in an action against the agent, yet by persisting after notice the agent makes himself *quasi* a principal. *Hardacre v. Stewart*, 5 Esp. C. 103.

45. If an agent appointed to receive money agree with his principal to pay it when received to a third person, the latter may on receipt sue the agent. *Stevens v. Hill*, 5 Esp. C. 247.

46. In an extensive business it is known that sometimes the principal does not appear, but it is otherwise in small concerns; in the former therefore an agent who conducts the trade is not liable as a principal, in the other he is. *Turrel v. Collet*, 1 Esp. C. 320.

47. *A.*, in *London*, acts as the agent of *B.* and Co. at *Paris*, for a small commission upon their general business. *B.* and Co. requests *A.* to remit them a bill on *Portugal*, which *A.* accordingly does, and indorses it. The indorsement being without qualification, *A.* is liable upon the bill, in an action brought against him by *B.* and Co. *Goupy v. Harden*, 1 Holt, p. 342.

48. An action may be maintained against an incorporated water works company, where workmen employed by persons who contract with the company, to lay down pipes for conducting water through a public street, do the work in a negligent manner, whereby an individual passing along the street receives an injury. *Matthews v. West London Water Works Company*, 3 Camp. 403.

Principal's liability for agent's misconduct.

49. If an order be given to an agent to deliver up any thing of which he had the management, his agency respecting it ceases as soon as he has delivered it up; and if he afterwards lay out money upon it for the benefit of the owner, this is a voluntary payment. *Eamiston v. Wright*, 1 Camp. 88.

Determination of agency.

50. *A.* residing at *X.* employs *B.* to reside at *Y.* to procure payment of a bill there, and he remits the produce direct to him at *X.*, *B.* receives payment of the bill, but remits the produce to a third person at *Z.* for *A.*'s use, whereby the whole gets into the hands of *A.*'s creditors, *A.* cannot maintain an action for money had and received against *B.* to recover the amount of the sum received in payment of the bill. *Duncan v. Skipwith*, 2 Camp. 68.

Miscellaneous.

51. *A.* in *London* consigns goods to the firm of *B.* and *C.* at *Hamburgh* for sale upon a *del credere* commission. *B.* in *London* makes advances to *A.* to be repaid out of the proceeds; *B.* and *C.* with the proceeds purchase bills for *A.*, which they transmit to *B.* in *London*, specially indorsed to him, and these bills, whilst they are in *B.*'s hands, are dishonoured; *B.* and *C.* must bear the loss. *Lucas and others v. Groning and others*, 1 Starkie, 391.

52. *A.* and Co. of *Liverpool*, employ *R.* and Co. as their bankers there: *R.* and Co. keep an account in *London* with *I.* and *L.* *A.* and Co. have no account with *I.* and *L.*; *A.* and Co. direct their agents in *London* to pay monies to "their account" at the house of *I.* and *L.* As *A.* and Co. had no account of their own with *I.* and *L.*, but through the medium of *R.* and Co. of *Liverpool*, and as their agents had been in the habit of paying monies of *A.* and Co. to the account of *R.* and Co., at the house of the *London* bankers of *R.* and Co.; Held, that the direction of *A.* and Co. to their agents, to pay to "their account" was sufficiently complied with, by a payment made to the account of *R.* and Co. as the agents had been in the habit of doing. *Breed and others v. Green and another*, 1 Holt, 204.

## PRINCIPAL AND SURETY.

1. Where notice to a surety of the principal's default is essential, the want of immediate notice is sufficiently explained by proof that the surety had quitted his house, and due enquiries had been made for him without success. *Harrison v. Fitzhenry*, 3 Esp. C. 240.

Notice to surety.

Contribution.

2. One of two joint sureties who has been compelled to pay the whole debt may recover contribution against the other, unless it was at his request that the other became surety. *Turner v. Davies*, 2 Esp. C. 478.

3. Where three gave a bond of indemnity, jointly and severally, and two paid the sum of indemnification (each half it is assumed), it was held, that they could not join in an action of money paid against the third for contribution. *Kelby and another v. Steel*, 5 Esp. C. 194.

## PRIZE.

Agent.

1. A person who while regularly licenced as a prize agent, receives orders for prize money from seamen, is not guilty of an offence within 49 Geo. 3. c. 123. s. 35., by receiving payment of these orders after his licence has expired. *Rex v. Davies*, 4 Camp. 48.

Payment.

2. An order for the payment of prize-money under the statute 49 Geo. 3. c. 123. s. 13., where the certificate required by the statute is signed in blank by the officers of the ship, on board of which the seaman is serving, and the date is inserted at a subsequent period, is irregular: and *semble*, damages cannot be recovered for the detention of such an order by an assignee for a valuable consideration, who describes it in the declaration as an order for the payment of money. *Neck v. Dougan*, 2 Starkie, 246.

## PROPERTY.

When vested.

1. Where by the custom of a trade, the manufacturer is bound to take materials damaged in the process, it does not become his own property, until the owner has elected that he shall take it. *Laclouch v. Toule*, 3 Esp. C. 114.

2. If in pursuance of a conspiracy to defraud *A.*, *B.* purchase goods for ready money, which he takes away under a promise to give a cheque for them three days afterwards, not then having one about him, the property is changed, and passes under a commission against *B.*, who immediately afterwards absconds and becomes bankrupt. *Milward v. Forbes*, 4 Esp. C. 173.

Rescission of exchange.

3. The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver. Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel v. Dane*, 3 Camp. 299.

Confusion of.

4. If *A.* for a fraudulent purpose mix his goods with *B.*'s, still if they can be distinguished, he retains the property in them, and he may maintain trespass against a person who, having a right to take *B.*'s goods, ignorantly takes these goods of *A.*'s as part of *B.*'s. *Colwell v. Reeves*, 2 Camp. 576.

## PROPERTY TAX.

Deduction of at Nisi Prius.

1. In an action for use and occupation the property-tax will not be

be deducted at *Nisi Prius* from the rent due. *Pocock v. Eustace*, 2 Camp. 181.

2. In an action for use and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial. *Baker v. Davis*, 3 Camp. 474.

### PROCESS.

1. Process cannot be lawfully executed in Kensington palace. Execution of. *Winter v. Miles*, 1 Camp. 475. n.

2. *Quære*, whether magistrates be liable for the expence of a gaol, built under their order at a sessions; at all events an individual of their number is not. *Tuck and another v. Ruggles*, 5 Esp. C. 237. Contract by.

### QUARTER SESSIONS.

Since a warrant by the sessions to arrest a defendant on an indictment, and have him at the next sessions, has no specific return day, it remains in force past the next sessions, and until the arrest. *Mayhew v. Hill and another*, 2 Esp. C. 683. Warrant of.

### RECEIPT.

1. A receipt in full is conclusive, if given with knowledge of all circumstances. *Briston and another v. Eastman*, 1 Esp. N. P. C. 173. How far conclusive.

2. Where a receipt in full has been obtained by fraud, or misrepresentation, it will be considered as a nullity. *Benson v. Bennett*, 1 Camp. 394. n. When obtained by fraud.

### RELEASE.

A general release in the common form discharges the release of all actions in respect of any thing that has happened before the date of the release, although the cause of action was not then complete. Therefore in an action by the payee against the drawer of a bill of exchange, such a release to the acceptor, who had become bankrupt and obtained his certificate, renders him a competent witness for the defendant. *Scott v. Lifford*, 1 Camp. 249. Construction of.

### REPLEVIN.

1. An action on the case will not lie for detaining cattle distrained and impound, where a tender of amends was not made till after the impounding. And *comme semble*, such an action could not be supported, even if the tender of amends had been made before the impounding; as the proper mode to try the validity of a distress, is by replevin or trespass. *Auscomb v. Sharpe*, 1 Camp. 285. When the appropriate action.

Replevin bond,  
assignment of.  
Pleadings.  
Proceedings in.

2. The assignment of a replevin bond, by a person acting in the sheriff's office, under the seal of the office, is sufficient. *Middleton v. Sandford*, 4 Camp. 36.
3. The plea of *riens arreare* to an avowry, admits the title as stated therein. *Hill v. Wright*, 2 Esp. C. 699.

## RIGHT, WRIT OF.

Writ of right ; tender of the demy mark, and what the demandant is bound to prove upon such tender, previous to the tenant being put upon proof of his title. *Hardman v. Clegg*, 1 Holt, 657.

## RIVER.

Rights of the  
conservators of.

A corporation being the conservators of a river, and owners of the soil, between high and low water mark, cannot authorise a lessee to erect a wharf there, which produces inconvenience to the public, in the use of the river for the purposes of navigation. *Rex v. Lord Grosvenor and others*, 2 Starkie, 511.

## SCIRE FACIAS.

Nonsuit.

In *scire facias*, the plaintiff may be non-suited. *O'Mealey v. Wilson*, 1 Camp. 484.

## SURGEON.

Fees.

1. If a medical practitioner pass himself off as a physician, although he have no diploma, and no right to assume that character, he cannot maintain an action for his fees. *Lipscombe v. Holmes*, 2 Camp. 441.

London.

2. *Semble*, that notwithstanding 3 H. 8. c. 11., which enacts, that no one shall practice as a surgeon in London, or 7 miles round, without being licensed by the college of surgeons, under the penalty of 5*l.* a month ; a person who is not so licensed may maintain an action for business done as a surgeon within these limits, the statute containing no prohibitory clause : and at any rate, it is incumbent upon the defendant in such action, to give evidence that the plaintiff is not regularly licensed as the statute directs. *Gremare v. Le Clerc Bois Valon*, 2 Camp, 144.

## SURVEYOR.

Fees.

A surveyor is to be paid according to his labour, and not according to the amount of the bills he looks over and settles. *Upsdell v. Stewart, Peake*, 193.

## SECRETARY OF STATE.

Access to state  
prisoners.

*Semble*, that notwithstanding the statute 31 Geo. 3. c. 46. s. 5., a secretary of state has the power of preventing those magistrates who  
18  
are

are not visiting magistrates from having access to state prisoners. *Rex v. Eaststaff*, 1 Gow, 138.

### SEDUCTION.

1. A master may maintain an action for debauching his servant, though he is in no ways related to her in blood. *Fores v. Wilson*, Peake, 55.

Relation of master and servant.

2. In an action for debauching a servant *per quod*, &c, it is not necessary to prove, that she was employed as a menial servant. *Fores v. Wilson*, Peake, 55.

3. Ruled in this case, that the relation of master and servant is established between a parent and child, by proof that the child was living in the house as one of the family. *Jones v. Brown and another*, 1 Esp. N. P. C. 217.

4. To establish the relation of master and servant, so as to maintain an action for seduction, it is not necessary that the party seduced should sleep in the master's house. *Mann v. Barrett*, 6 Esp. C. 32.

5. *A.* with intent to seduce the servant and daughter of *B.*, hires her as his servant, and by this means obtains possession of her person; *B.* may maintain an action against *A.* for such seduction. *Speight v. Oliviera*, 2 Starkie, 493.

6. A father who has permitted a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her. *Reddie v. Scolt*, Peake, 240.

Defence.

### SET OFF.

1. If a creditor borrow money of his debtor, upon promise (or security) to repay it, notwithstanding his own demand, the promise is only an honorary obligation, and he may therefore set off his own demand to an action for the money. *Lechmore v. Hawkins*, 2 Esp. C. 626., accord. 1 East, 375; but see 16 East, 138.

When allowable.

2. It is no objection to the set off of a debt that the defendant had commenced an action for the recovery of that debt, before the plaintiff's cause of action accrued. *Oldnibbs v. Hall*, Peake, 210.

3. If a factor, under a commission *del credere*, sell his principal's property as his own, the buyer may set off to an action by the principal, of whom he knew nothing, any demand owing to him from the factor. *George v. Clagett and another*, 2 Esp. C. 557; S. C. 7 T. R. 359.

4. If goods be bought by a broker who does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor. *Waring v. Favench*, 1 Camp. 85.

5. A defendant may set off a debt due to him as surviving partner against a demand in his own right. *Slipper and others v. Stidstone*, 1 Esp. N. P. C. 47.; S. C. 5 T. R. 493.

6. *A.* before his bankruptcy discounts certain bills of exchange with *B.* and Co. his bankers. They give him immediate credit for the value of the bills in his account *minus* the discount. *A.*'s balance is likewise struck before the bankruptcy, and, whilst the bills were yet running.

running in favour of *A.*, when the bankers admit that they have in their hands 934*l.* 8*s.* 8*d.* due to *A.*; giving him credit for the bills then running. *A.* becomes a bankrupt, and the bills are dishonoured. Held, that in an action against the bankers for the balance admitted to be due to *A.* before his bankruptcy, they have a right to set off against such claim the amount of the dishonoured bills, it being a case of *mutual credit*, under the 5 Geo. 2. c. 30. s. 28. *Arboun and another v. Tritton and others*, 1 Holt, 408.

7. In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by the plaintiff to the defendant, which the latter effected with a *del credere* commission. *Wienholt v. Roberts*, 2 Camp. 586.

8. Held, that insurance brokers, who, without a *del credere* commission, had effected policies in their own names, in which they were described "as agents," could not in an action for premiums by the assignees of a bankrupt underwriter who had subscribed these policies, set off a total loss which had happened before the bankruptcy, but which had not been adjusted; although the policies had always remained in their hands, and they had actually paid the amount of the loss to their principal. *Baker and others v. Langhorn and others*, 4 Camp. 396.; S. C. 6 Taunton, 519; 2 Marshall, 215.

9. *Semble*, that if *A.* be under acceptance to *B.*, he may retain money of *B.*'s in his hands to discharge it, either until the bill be delivered up to him, or until he receive a bond of indemnity against being sued upon it. *Rex v. Watson*, 1 Camp. 3.

10. Where goods are sold to be paid for by a bill of exchange at a given date to an action commenced within that time for refusing to give such bill, the defendant cannot set off a debt due to him from the plaintiff. *Hutchinson v. Reid*, 3 Camp. 329.

11. If *A.* agree to make a waggon for *B.*, and make it accordingly, but refuse to deliver it unless the money be paid on delivery, the money which was to be paid for the waggon may be set off to any demand of *B.* against *A.* as goods bargained and sold. *Dunmore v. Taylor, Peake*, 41.

12. A bookkeeper in Smithfield market, receiving money for beasts sold there, is liable to pay such money to the owner of the beasts, and cannot apply it in payment of a debt due to him from the salesman. *Goods v. Jones, Peake*, 177.

13. *A. B. C.* and *D.* are in partnership together, and *C.* and *D.* also trade on their separate account. The partnership of *A.* and *Co.* becomes indebted to *C.* and *D.*, and to satisfy such debt, they indorse a note given to them. In an action by *C.* and *D.*, as indorsees of that note, the debtor may set off any demand he has against *A.* and *Co.* *Puller v. Roc, Peake*, 198.

14. Though the plaintiff might have declared as for a debt, yet if he go for unliquidated damages, the defendant is deprived of a set off. *Colson and another v. Welsh*, 1 Esp. C. 378.

15. A guarantee for the debt of another, is not the subject of a set off. *Crawford and others v. Stirling*, 4 Esp. C. 207.

When unnecessary.

16. In an action by a servant against his master for wages, the latter cannot generally set off the value of goods lost by the negligence of the former; but if it be proved to have been part of the original agreement between them, that the servant should pay out of his wages for all his master's goods lost through his negligence, the value of goods so lost may, under the general issue, be deducted from the amount of the wages. *Le Loir v. Bristow*, 4 Camp. 134.

17. Where

17. Where by the custom of the hat trade, the amount of the injury sustained by the hats in the process of dyeing, is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought by the dyer, without giving any notice of set off, and although there has not been any previous adjustment of the amount of the damage. *Bamford v. Harris*, 1 Starkie, 343.

18. A demand that has been set off was discharged; but if the set off were more than sufficient to cover the adverse claim, the excess may be the subject of an action. *Hennell v. Fairlamb*, 3 Esp. C. 104. Its effect.

19. If after a settlement of accounts between *A.* and *B.*, *A.* means to open the account by setting off an overcharge therein against an action by *B.*, a special plea of set off, disclosing the circumstance is requisite instead of the common one. *Hampton v. Jarratt*, 2 Esp. C. 560. Plea.

20. Where the plaintiff declares specially in assumpsit for not accounting, with a count for money had and received, non assumpsit being pleaded to the whole declaration, and a set off to the general count; the plaintiff having proved a balance to be due to him which he might have recovered under either count, the defendant shall not be deprived of the benefit of his set off, and if he establish it, he is entitled to a verdict on the whole declaration. *Birch and another v. Depeyster*, 4 Camp. 385.

21. Under a general notice of set off for money paid to the plaintiff's use, evidence of money paid in taking up the plaintiff's note, is admissible. *Ord v. Ruspini*, 2 Esp. C. 569. Notice.

22. Notice of set off may be given, as well where the general issue is coupled with other pleas, as where pleaded by itself. *Coulson v. Jones*, 6 Esp. C. 50.

23. Covenant, plea *non est factum*; the defendant cannot give evidence of set off under a mere notice without plea. *Oldershaw v. Thompson*, 1 Starkie, 311.

24. Where the defendant has a set off against the plaintiff of which he gives notice under the statute, but does not appear at the trial to offer evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts if the defendant will afterwards enter into a rule not to sue for the set off; or he may take a verdict for the smaller sum, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set off. *Laing v. Chatham*, 1 Camp. 252.

## SHERIFF.

1. Sheriff's poundage is due on a levy, though the execution is afterwards set aside. *Buller v. Ansley and another*, 6 Esp. C. 111. Fees.

2. The sheriff cannot maintain an action for the expence incurred in seizing and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons. *Bilke v. Havelock*, 3 Camp. 374.

3. An action lies against the sheriff for a false return to a writ of *fi. fa.*, notwithstanding the plaintiff before commencing the suit, False return by.  
having



having charged the defendant in the former action in execution. Wordall v. Smith, 1 Camp. 332.

Negligence by. 4. It is not a sufficient justification to the sheriff for refusing to execute process, that the individual against whose person or goods it issues, has the appointment of domestic servant to a foreign minister at our court, and that notice of this has been stuck up at the sheriff's office, unless the appointment be *bond fide*, and in an action against the sheriff for a false return, the plaintiff may show that the appointment was merely colourable. Delvalle v. Plomer, 3 Camp. 47.

Sale by. 5. There is no implied promise on the part of a sheriff to indemnify an auctioneer who sells goods, seized under a *fi. fa.*, when employed to do so by the sheriff's office, to whom the warrant was directed, and the plaintiff's attorney in the original cause, although the sheriff certified to the excise officer, that he himself had seized and sold the goods, and he in fact received his poundage from the produce of the sale; and if in an action of trespass brought by the owner of the goods against the auctioneer, the sheriff and others, all the damages awarded in such, are levied upon the auctioneer alone, he has no action for a contribution against any of his co-defendants. Farebrother v. Ansley, 1 Camp. 343.

6. Whether, if the sheriff had himself actually employed and directed the auctioneer to sell the goods, there would have been an implied promise of indemnity. Ibid.

When protected. 7. A sheriff's officer is not justified in executing exchequer process, issued to arrest a party for offences under the lottery act, unless founded on a previous information (when requisite); which therefore he must prove in an action against him. O'Connor v. Charter, 2 Esp. C. 641.

8. Where after a secret act of bankruptcy, the sheriff took in execution the goods of a trader under a *fi. fa.*, and removed them to a broker's and the assignees of the bankrupt afterwards served a notice upon him not to sell them; for which reason they were allowed to remain unsold at the broker's; held, that the sheriff was liable to an action of trover, at the suit of the assignees, without any demand of the goods. Wyatt and another v. Blades and another, 3 Camp. 396.

Liability for the acts of his officers.

9. Where a sheriff is to be made liable for an act done by another in the character of his bailiff, they must be connected together in the individual transaction, as by proving a warrant from the sheriff to the bailiff, for the act in question. Wilson and another v. Norman, 1 Esp. N. P. C. 154.

10. Admitted that if a bailiff on arresting a debtor take a sum of money under promise, which he neglects to perform, to return it on justification of bail, an action to recover it lies against the sheriff. M'Neil v. Perchard and another, 1 Esp. 263.; but reporter adds a *quære*.

11. Where a bailiff on executing a writ takes unlawful fees for the sheriff, the latter is liable under statute 6 Hen. 6. and 32 Geo. 2. c. 28., or to an action of money had and received, even though he may not have received them. Ions v. Perchard and another, 2 Esp. C. 507.

12. One bailiff cannot be identified with another through the medium of a partnership alleged to exist between them, since it cannot exist. Ions v. Perchard and another, 2 Esp. C. 508.

13. The sheriff is responsible for the execution of a writ by his bailiff after the return day. Pavyot v. Mumford, 2 Esp. C. 585.

14. The

14. The sheriff is only answerable for his own appointed officers, and therefore cannot be ruled to return the writ where it has been executed by a bailiff nominated by the party; though if he do return it, he makes himself liable. *Beckford v. Welby*, 2 Esp. C. 591.

15. The sheriff is only liable for the misconduct of his officer, where he has charged the officer to execute the law. *George v. Perring and another*, 4 Esp. C. 63.

16. After a return to a writ of *fi. fa.* that the money is levied, the sheriff is liable to an action for money had and received, without any demand of payment. *Dale v. Birch and another*, 3 Campbell, 347.

## SHIP.

1. A general ship having been advertised for a particular voyage, if her destination be in any respect altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board. *Peel v. Price*, 4 Campbell, 243. Duty of the owner.

2. The captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them. And if he intermeddle with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable. *Nelson v. Macintosh*, 1 Starkie, 237.

3. In action against the owner of a ship for breach of an undertaking to sail with a convoy, it is a sufficient defence to show that the ship was delayed in taking on board the plaintiff's goods, and that after receiving them, the master having made every practicable exertion to join the convoy with which he ought to have sailed, but without effect, proceeded on his voyage without enemy. *Magalhaens v. Busher*, 4 Campbell, 54. Contract of the owner.

4. Where there is an undertaking to sail with convoy, it is not a sufficient excuse that the ship was prevented joining the convoy by the state of the weather. *Sanderson and others v. Busher*, 4 Campbell, 54.

5. There is no implied undertaking on the part of the owner of a ship, that a bill of exchange drawn by the master on a third person for money advanced for the ship's use abroad, shall be duly honoured. *Harder v. Brotherstone and another*, 4 Campbell, 254.

6. Although one part-owner of a ship have no implied authority as such, to order insurances to be effected on account of the other part-owners; yet if they be in partnership together, an order to insure the ship given by one renders all liable. *Hooper and another v. Lasby and others*, 4 Campbell, 66. Part owner.

7. A managing-owner and part-owner of a ship cannot bind another part-owner by effecting an insurance on the ship without his authority. *Bell v. Humphries*, 2 Stark. 345.

8. Where a ship is chartered for a voyage, the chartered party, not the owner, is responsible to customers, since he is owner *pro hac vice*. *James v. Jones and another*, 3 Esp. C. 27. Who liable as owner.

9. The party on whose account the contract was really made is liable as owner of the vessel, notwithstanding the legal ownership may be in another. *Ratchford v. Meadows and another*, 3 Esp. C. 69.

10. The defendant purchased a ship taken in execution under a *fi. fa.* in the year 1805; but the legal title was not regularly transferred

ferred to him till 1810. In 1806, he entered into an agreement with the captain to let him the ship for three years at a certain yearly rent, and in no way interfered with the management of the ship afterwards. Held, that the defendant was not liable for stores supplied to the ship during the three years, by order of an agent of the captain. *Fraser v. Marsh*, 2 Camp. 517.

11. Where a ship is mortgaged, but the mortgager continues in possession, the master employed by him cannot maintain an action for wages and disbursements against the mortgagee. *Annett v. Carstairs* and another, 3 Campbell, 354.

12. A mere mortgagee of a ship who does not take possession, is not liable for necessities supplied for the use of the ship previous to a re-transfer. *Twentyman v. Hart*, 1 Starkie, 366.

Repairs and  
Disbursements.

13. Though the captain of a vessel may hypothecate her in a foreign country, to raise money for repairs, he cannot sell unless in cases where the ship has received an irremediable injury. *Hayman v. Molton* and others, 5 Esp. C. 65.

14. In case of capture and re-capture, the mate, in the absence of the captain, has a right to hypothecate the ship for the purpose of paying the salvage to the re-captors. *Permetter v. Todhemter*, 1 Camp. 541.

15. A chartered ship at her outward port being in want of money for her necessary disbursements, a merchant there being shown the charter party by which the freighter covenants to furnish what money might be required for the necessary disbursements of the ship, advances the requisite sum to the master, and takes a bill of exchange drawn by him for the amount upon the freighter: Held, that on this bill being dishonoured by the freighter, the owner of the ship was not liable for any part of the money advanced. *Harder v. Brotherstone* and another, 4 Campbell, 254.

16. The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel. *Rocker v. Busher*, 1 Starkie, 27.

17. The owner of a ship is liable for stores and necessities supplied by the order of the supercargo after the detention and liberation of the vessel by a foreign power, although the supplies be afforded after an abandonment by the owner to the underwriters. And although the supplies be furnished for the purpose of enabling the vessel to prosecute a second voyage, in the prosecution of which she is seized by British officers, and confiscated, yet the institution of proceedings in the Admiralty Court by the defendant to recover possession of the vessel, amounts to an adoption of the second voyage, and renders him liable for the amount. *Mitchell* and another v. *Glennie* and others, 1 Starkie, 230.

Cargo.

18. By the custom of the river *Thames*, the master of a vessel is bound to guard goods loaded into a lighter sent for them by the consignee until the loading be complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley v. Wintringham, Peake*, 150.

19. It is incumbent on the shipper to send notice of the shipment to the consignee, that he may insure unless the course of dealing between them be different. *Goom v. Jackson*, 5 Esp. C. 112.

20. If goods put on board a ship to be carried from one place to another be wrongfully seized by the officers of government, so that they cannot be delivered to the consignee, the owner of the goods has

has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of government. *Gosling v. Higgins*, 1 Camp. 451.

21. Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven for the benefit of the shippers; and if he do so, though acting *bond fide* for the interest of all concerned, this is a tortious conversion for which the ship-owner is liable. *Von Omeron v. Dowick*, 2 Camp. 42.

22. The consignee of a particular parcel of goods by a general ship, is liable to the ship-owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the treasury to land these goods, which the consignee used the utmost diligence to obtain. *Hill and others v. Idle and others*, 4 Campbell, 327.

23. The master of a vessel is not justified in selling any part of the cargo for the repairs of the ship in a foreign port, except in cases of urgent necessity. *Campbell v. Thompson*, 1 Starkie, 490.

24. A captain of a ship is not justified in selling the cargo at a foreign port although it be impossible to prosecute the original voyage, and although a sale of the goods be the most beneficial course for the owner. *Wilson v. Millar*, 2 Stark. 1.

25. The captain of a ship has no authority as such to agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters of the ship in England, and on which he has sailed to a foreign country. *Burgon v. Sharpe*, 2 Camp. 529. Authority of Masters.

26. A promise by the captain of a ship to pay the seamen extra wages in consideration of extraordinary exertion in times of danger, is *nudum pactum*. *Harris v. Watson*, Peake, 72. Seamen.

27. Notwithstanding a capture, if the ship be afterwards re-captured, and arrive, the seamen are entitled to wages, since freight, the mother of wages, is thereby earned, deducting the salvage. *Bergstrom v. Mills*, 3 Esp. C. 36.

28. If an English ship be captured, and any of her crew, though foreigners, enter the enemy's service, they forfeit their wages notwithstanding a re-capture and arrival. *Bergstrom v. Mills*, 3 Esp. C. 38.

29. The statute 37 Geo. 3. c. 73. s. 3. having prohibited more than double wages being given to seamen coming from the West Indies, unless the captain be specially licensed to give a greater rate by the chief officer of the port, a general licence by such chief officer to a captain "to procure men on such terms as he can," is insufficient. *Rodgers v. Lacy*, 3 Esp. C. 43.; S. C. 2 B. and P. 57.

30. If a seaman desert, he forfeits his wages. But a refusal by a sailor to leave the shore to which he had been sent on duty, until he had procured some victuals, and a return to the ship the next morning, when the captain refused to receive him, is not a desertion. *Ligard v. Roberts*, 3 Esp. C. 71.

31. Where seamen are not to be entitled to their wages until the ship's arrival in a foreign port, and before its arrival the master wrongfully dismisses them, they may immediately sue for their wages. *Sigard v. Roberts*, 3 Esp. C. 73.

32. If a sailor be obliged through the master's misconduct to leave the ship, he is not guilty of desertion, and therefore does not forfeit his wages. *Limland v. Stephens*, 3 Esp. C. 269.

33. The rule is without an exception, that the ship must perform her

her voyage to entitle the seamen to wages, unless under a special contract. *Eaken v. Thorn*, 5 Esp. C. 6.

34. An agreement express or implied to allow more wages to a seaman than those stipulated for in the articles executed pursuant to statute 2 Geo. 2. c. 3. is void. *Elsworth v. Woolmore* and another, 5 Esp. C. 84.

35. An impressed seaman is not entitled under statute 2 Geo. 2. c. 36. to wages *pro rata*, where, had he remained on board, he would not have been; as where the vessel is wrecked before the voyage ended. *Dunkley v. Bulwer* and another, 6 Esp. C. 86.

36. An agreement between the master of a ship and a sailor for increase of wages in consideration of extra work is void. *Stilk v. Myrick*, 6 Esp. C. 129.

37. In the course of a voyage some of the seamen desert, and the captain not being able to find others to supply their place, promises to divide the wages which would have become due to them among the remainder of the crew. This promise is void for want of consideration. *Stilk v. Myrick*, 2 Camp. 317.

38. A seaman at monthly wages, who is impressed or enters from a merchant ship into the Royal Navy during a voyage, is not entitled to wages to the time of his quitting the ship, unless the voyage be completed. *Anon*, 2 Camp. 320. n.

39. Where it is provided by a ship's articles that any of the crew who shall absent themselves from the ship without leave, shall forfeit their wages; if, after one of the crew has so absented himself, the master receive him back again and allow him to work like the others, the forfeiture is waived, and the wages are recoverable. *Miller v. Brant*, 2 Camp. 590.

40. If foreign sailors stipulate in their own country before the commencement of a voyage that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action against him for wages in the courts of this country. *Johnson v. Machielsne*, 3 Camp. 44.

41. During a voyage the ship is wrecked, and the captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the same time that he had hired them by the month. Held, that under these circumstances no action for wages could be maintained by the mariners against the captain, at least without proving that they had first made a demand upon the owners. *Forsboom v. Kruger*, 3 Camp. 197.

42. Statute 2 Geo. 2. c. 36. requiring articles to be entered into between the masters of ships and the mariners, and providing that the mariners shall not fail in any suit for wages from not producing the articles, does not apply to the case of a British seaman entering on board a foreign ship in a British port. *Dickman v. Benson*, 3 Campbell, 290.

43. A seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port, and the delivery of her cargo. Held, that although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, and which he had offered to pay him. *White v. Mattison*, 2 Stark. 325.

44. A purser's steward on board one of his Majesty's ships cannot recover wages from the purser upon an implied contract for his services as such on board the ship. *Carter v. Hall*, 2 Stark. 361.

45. There

45. There is no implied promise on the part of an officer in the *East India Company's Service*, to pay the captain of a Company's ship by which he returns to *England*, more than the regulation sum for his passage, although it may have been usual to pay more. *Adderley v. Cookson*, 2 Camp. 15. Passengers.

46. If the captain of an *East Indiaman* die at the outward port, after having contracted to bring home certain passengers, and laid in a certain quantity of stores for the homeward voyage; and the chief mate succeeding to the command bring home these and other passengers, and provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage money of the passengers with whom he had contracted, and the mate to that of the others; — the representatives being liable to him for the portion of the stores laid in by him, consumed by the former class of passengers, and he being liable to the representatives for the portion of the captain's stores consumed by the latter class of passengers. *Siordet v. Brodie*, 3 Camp. 253.

47. There is an agreement to carry a passenger on board a ship, from *London* to the *West Indies*, the passage money to be paid in *London* before the commencement of the voyage. The passenger puts his baggage on board in the *Thames*, meaning himself to embark at *Portsmouth*. The ship is lost in going round to that place. The passage money cannot be recovered back. *Aliter*, if the agreement had been to carry the passenger from *Portsmouth* to the *West Indies*. *Gillan v. Simpkin*, 4 Campbell, 241.

48. If an accident occur by the running down of the plaintiff's vessel whilst a pilot is lawfully on board the vessel of the defendant; the latter is exonerated from all responsibility; being divested of his authority in the ship, *pro tempore*, by the presence of the pilot. But the captain would be responsible for any mischief directly moving from himself. *Bennet and another v. Morta*, 1 Holt, 359. Pilot.

49. A hoyman to whom goods have been entrusted, discharges his duty, by delivering them at a wharf to which he plies; such being his known and accustomed mode of dealing. *Wardell v. Mourillyan*, 2 Esp. C. 693. Hoyman.

50. The bill of sale of vessels for inland navigation need not be registered. *Laroche v. Wakeman, Peake*, 141. Sale.

51. The seller of a ship is bound to disclose to the buyer all latent defects known to him. *Mellish v. Motteux, Peake*, 115.

52. If *B.* sell a ship belonging to *A.* and promised to account to him for the proceeds, and pay the balance due, on the footing of the account to be rendered; *A.* may, (notwithstanding the ship registry acts,) maintain an action founded on such promise, although *B.* be the sole registered owner of the ship. *Prouting v. Hamond*. 1 Gow. p. 41.

53. If the master of a ship in a foreign port from the state of the Exchange receive a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use. *Diplock v. Blackburn*, 3 Campb. 43. Profits.

54. A ship is not of the *built* of Russia, within the meaning of the navigation act, which having been originally constructed in another country, was wrecked on the coast of Russia, and repaired there at an expence of more than two-thirds of her value; although by the law of Russia she were under these circumstances to be considered a Russian ship, and although she afterwards may have a Russian register, Navigation act.  
were

were owned by a Russian subject, and were navigated under the Russian flag. *Redhead and another v. Cater*, 4 Campbell, 188, S. C. 1 Starkie, 14.

## SLANDER.

What is or is not.

1. Words actionable in themselves as containing a charge of felony, if spoken in reference to a trespass or breach of contract, are not so. *Christie v. Cowell, Peake*, 4.

2. To say of an attorney, "I have taken out a summons to tax his bill; I shall bring him to book, and have him struck off the roll;" is not actionable; — seems to say that he deserves to be struck off. *Phillips v. Jansen*, 2 Esp. C. 624.

3. If a party lay an information before a magistrate, not amounting to a charge of felony, he is not answerable as for imposing the crime of felony, because the magistrate mistaking the law by concluding that the information is of that crime, grants a warrant for felony. *Leigh v. Webb*, 3 Esp. C. 165.

4. That expressions may be actionable, their import must be unequivocal. *Harrison v. Stratton*, 4 Esp. C. 218.

What not.

5. To impute to another evil inclinations is not actionable. *Harrison v. Stratton*, 4 Esp. C. 218.

6. If words, *prima facie*, imputing felony, have been used in a different sense, they are not actionable. *Thompson v. Bernard*, 1 Camp. 48.

7. An action for defamation cannot be maintained against a man whose property has been stolen, and who upon reasonable grounds of suspicion charges an innocent person with having stolen it. *Fowler and another v. Homer*, 3 Campbell, 294.

8. No action can be maintained against a counsel for words spoken in a judicial proceeding, provided they be pertinent to the cause, and that no malice against the individual who is the subject of the words be proved against him. *Hodgson v. Scarlett*, 1 Holt, 621.

Intention.

9. The rule that as well malice as falsehood is an essential in slander, holds with respect to criticism; therefore, a *bond fide* critique on a place of public entertainment, though mistaken, is not actionable. *Dibdin v. Swan and another*, 1 Esp. N. P. C. 28.

10. Malice is not to be inferred from an accusation in a course of justice, as in giving a party in charge to an officer, or in preferring a complaint to a magistrate, because it is unfounded, therefore it is not necessary actionable. *Johnson v. Evans*, 3 Esp. C. 32.

11. A writing of injurious tendency, if published *bond fide*, as with the view of investigating a fact, and not to slander the party, is not actionable. *Delany v. Jones*, 4 Esp. C. 191.

12. A confidential communication, which, if true, the party was in duty bound to make, is not actionable without proof of express malice. *Barbaud v. Hookham*, 5 Esp. C. 109.

13. Where *A.* having summoned *B.* his master, before a court of conscience, for wages, *B.* there utters words of imputing felony to *A.* — if this charge be necessary to *B.*'s defence, no action can be maintained against him by *A.* for defamation; *aliter*, if the words be spoken maliciously, though addressed to the court. *Trotman v. Dunn*, 4 Campbell, 211.

14.

14. Words imputing felony, but spoken with reference to a warrant issued for the plaintiff's apprehension, and not intended to convey a substantive charge, are not actionable. *Tempest v. Chambers*, 1 Starkie, 67.

15. Where a defendant in slander justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial, without the intervention of a grand jury. *Cook v. Field*, 3 Esp. C. 134. Justification.

16. Action for words imputing a crime; an agreement on the part of the plaintiff to raise his action for words spoken, in consideration that the defendant will destroy certain documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession) a bar to the action, and may be given in evidence under the general issue. *Lane v. Applegate*, 1 Starkie, 97. Discharge.

17. Words spoken at different times may be given in evidence on one count. *Charlter v. Barret, Peake*, 22. Pleadings.

### SOUTH SEA COMPANY.

1. *Semble*, that after a ship has sailed on a voyage to a place within the limits of the *South Sea Company*, a retrospective licence granted by the Company is insufficient to legalize the voyage. *Hobbs v. Flannan*. 3 Camp. 95. Licence.

2. A licence granted by the *South Sea Company*, cannot operate retrospectively. *Cowie and others v. Barber*, 4 M. & S. 16. S. C. 4 Camp. 100.

3. A ship which is sent to a place within the limits of the *South Sea Company's* charter, in order to bring home part of a return cargo of another ship, is not protected by the licence granted by the *South Sea Company* to that other ship. *Cowie and others v. Barber*, 4 M. & S. 16. S. C. 4 Camp. 100.

### SPIRITUOUS LIQUORS.

1. The statute of the 24 Geo. 2., against selling liquors in quantity under the value of 20s., does not extend to liquors sold for the purpose of being sold again. *Jackson v. Attrill, Peake*, 180. Statute.

2. A bill of exchange accepted by an officer in the recruiting service in payment of small quantities of spirits under the value of 20s. supplied by a publican to be used out of his house by recruits and others, under the command of the acceptor, is valid notwithstanding. 24 Geo. 2. c. 40. s. 12. *Spencer v. Smith*, 3 Camp. 9.

### STAGE COACH.

If a passenger by the stage pays the whole fare, he may take his place at any part of the journey; but if only part, the driver may take up another customer if he is not ready at the place of starting. *Ker v. Mountain*, 1 Esp. N. P. C. 27. Passengers.



## STAMP.

When necessary.

1. An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money within 23 Geo. 3., and liable to the stamp duty imposed by that act on such receipt. *Scholy v. Walsby, Peake, 24.*

2. An advertisement in the Gazette that a partnership has been dissolved, unless stamped as an agreement, is inadmissible to prove the dissolution. *May v. Smith, 1 Esp. C. 283.*

3. An agreement made out of the kingdom, for instance, at sea, need not be stamped. *Ximenes v. Jaques, 1 Esp. C. 311.*

4. An agreement to share in the outfit and adventure must be stamped, not coming within the exception as to contracts for the sale of goods. *Leigh and another v. Banner, 1 Esp. C. 403.*

5. By the regulations of Sweden, the articles of a Swedish ship on arrival in this country are lodged with her consul. *A.*, a Swedish seaman, is hired in London by the captain of the vessel, and an entry of the hiring, &c. made in the articles. Held, that in an action by *A.*, for wages, the defendant might read the articles as evidence of the agreement, though unstamped, since they were to be considered as a public document of Sweden. *Winbled v. Malmberg, 1 Esp. C. 454.*

6. Writings made in a foreign country are not admissible in evidence here, unless duly stamped by the laws of that country. *Alves v. Hodgson, 2 Esp. C. 528. ; S. C. 7 T. R. 241.*

7. The clause in the stamp act, excepting demises under 5*l.*, only applies to leases at a rack rent, not to beneficial interests, such as building leases. *Doe ex dem. Hunter and another v. Boulcot and another, 2 Esp. C. 595.*

8. No specific terms are requisite to a receipt ; therefore to write "settled" on a bill without a stamp, incurs the penalty of giving an unstamped receipt. *Spawforth v. Alexander, 2 Esp. C. 621.*

9. The stamp act imposing a duty on auctions, exempts sales of bankrupt's effects before the commissioners. The sale by auction of the bankrupt's mortgaged estate is not within the exception. *Coare v. Creed, 2 Esp. C. 699.*

10. An instrument produced by the opposite party on notice, cannot be read, unless stamped. *Doe ex dem. St. John v. Hore, 2 Esp. C. 724.*

11. Under a count for articles supplied to one alleged to have been bound apprentice to the defendant, the plaintiff must prove a legal apprenticeship, by producing the indentures, which, if not stamped, cannot be read. *Aldridge v. Ewen, 3 Esp. C. 188.*

12. A draft on a banker, post dated, and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by statute 31 Geo. 3. c. 25. *Allen v. Keeves, 3 Esp. C. 281. ; S. C. 1 East, 435.*

13. A writing on a bill of parcels, "settled by one bill at three, and another at nine months," is inadmissible evidence, unless stamped. *Smith v. Kelby, 4 Esp. C. 249.*

14. If a stamp is necessary to the validity of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in evidence in our courts of justice. But it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the stamp, by an authenticated copy, if it be in writing, and if not, by the testimony of a wit-

ness acquainted with the laws of the foreign country. *Clegg v. Levy*, 3 Campb. 166.

15. A receipt for taxes, signed by a clerk of the deputy-receivers general of a county in their name, may be given in evidence without a stamp. *Edden v. Read*, 3 Campb. 338.

16. Where the agreement, on which the action is brought, is contained in a prospectus of terms, delivered by the plaintiff to the defendant, it is necessary to get that identical copy stamped, which has been delivered, and it is not sufficient to get another copy stamped. *Williams v. Stoughton*, 2 Stark. 292.

17. Where the body of a bill is written, and the acceptance of it made in England; yet, if it be afterwards transmitted to the drawer abroad, for his signature, and it is there drawn, the bill is a foreign bill; and, consequently, does not require an English stamp. *Boehm v. Campbell*, 1 Gow. 56.

18. An *I. O. U.* is neither a receipt nor a promissory note, but a mere admission, and therefore need not be stamped. *Fisher v. Leslie*, 1 Esp. C. 426. When not.

19. A bond conditioned to produce a box containing the subscriptions of a friendly society, need not be stamped, being within the exemption in statute 33 Geo. 3. c. 54. (Friendly Society Act.) *Carter v. Bond*, 4 Esp. C. 253.

20. An agreement for the sale and payment of goods, with a stipulation of mutual indemnity with respect to them, need not be stamped. *Heron v. Granger*, 5 Esp. C. 269.

21. A guarantee for the payment of goods, which a third person was about to purchase to a certain amount, is an agreement relating to the sale of goods within the exception in the stamp act. *Warrington and another v. Furber and another*, 6 Esp. C. 89.; *S. C.* 8 East, 242.

22. A written paper, containing a bare acknowledgement of a debt, is good evidence under the money counts, without a stamp. *Israel v. Israel*, 1 Camp. 499.

23. After a breach of contract for the sale and delivery of goods, the defendant enters into a fresh agreement in writing to cancel the former agreement, and for the future sale of goods upon different terms, the second agreement relates to the sale of goods, and does not require an agreement stamp. *Witworth v. Crockett*, 2 Starkie, 431.

24. Where a peculiar stamp is appropriated, an *ad valorem* stamp of another denomination is insufficient. *Robinson v. Drybrough*, 1 Esp. C. 243. But see *Aitcheson v. Sharland*, *id.* 292.; and in which case Lord Kenyon doubted this decision. Denomination.

25. An *ad valorem* stamp of a different denomination is sufficient, where the proper stamp for the instrument in question is imposed by a single act of parliament, and is not made of several different sums imposed at different times. *Aitcheson v. Sharland*, 1 Esp. C. 292.

26. *Quære*, whether a 2s. stamp be sufficient for a bill for 60*l.* with all legal interest. *Israel v. Benjamin*, 3 Camp. 40. Amount of value.

27. A bond given for the purpose of securing certain conditions to be performed by the vendor of a house, requires a 20*s.* stamp only, and not an *ad valorem* stamp. *Hughes v. King*, 1 Starkie, 119.

28. A deed by which the plaintiff covenants to give up his trade to the defendant, and to allow him to carry it on in his house for ten years, the defendant paying 1000*l.* for the fixtures, &c. at the time of executing the deed and covenanting to pay 1000*l.* per annum for ten years, does not require an *ad valorem* stamp. *Lyburn v. Warrington*, 1 Starkie, 162.

Number.

29. The value of a stamp upon a bill of exchange under the statute 35 G. 3. c. 184. shed. tit. bill of exchange depends upon the face of the bill. *Peacock v. Murrell*, 2 Starkie, 558.

30. If two persons by an agreement in writing lay a wager, and then by another agreement indorsed on the first, consent that it should be doubled, there must be two sixpenny agreement stamps. *Robson v. Hall*, Peake, 128.

31. But if there is only one stamp, the winner may cover the first bet on a count thereon. *Robson v. Hall*, Peake, 128.

32. If the several parts of an agreement are proposed at different times, and ultimately and for the first time ratified, their dates are brought down to the time of ratification so as to make the whole one entire contract, and to require one stamp only. *Knight v. Crockford*, 1 Esp. N. P. C. 190.

33. Even admitting that a paper containing separate agreements is inadmissible as evidence of any one agreement, unless it has stamps sufficient to cover the whole; yet if it appears that some have been erased, whereby a sufficiency of stamps is left, it will be presumed that the erasure was made before the paper was stamped. *Waddington v. Francis*, 5 Esp. C. 182. See 12 East, 6.; 1 Camp. 8.

34. If a receipt for money and an agreement are written on the same piece of paper, this is receivable in evidence as a receipt, if it has a receipt stamp, without an agreement stamp. *Grey v. Smith*, 1 Camp. 387.

Time of stamping.

35. It is no defence to an action at the suit of the indorsee of a promissory note or bill of exchange, that the bill was not stamped at the time of making it, if it has a proper stamp when produced at the trial. *Wright v. Riley*, 173.

36. Although a policy of insurance produced at the trial of an action has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped afterwards by order of the Commissioners of Stamps, for this is forbidden by 35 G. 3. c. 63., and not authorized by 37 G. 3. c. 136., which extends only to such instruments as could before be legally stamped after they were executed. *Roderick v. Hovill*, 3 Camp. 103.

Dispensation with.

37. In an action on a bill of exchange after payment of money into court, the defendant cannot object to the sufficiency of the stamp on which the bill is drawn. *Israel v. Benjamin*, 3 Camp. 40.

Effects of the want of.

38. An agreement not stamped cannot be received as evidence for any purpose whatever, not even to show that the party meant to commit a fraud by that agreement. *Whitwell v. Dimsdale*, Peake, 167.

39. A bill of exchange unstamped is a nullity, and therefore no discharge of the demand for which it was given. *Ruff v. Webb*, 1 Esp. N. P. C. 129.

40. If an unstamped bill or note is given for an existing demand, since it is a nullity the creditor may sue on the original consideration. *Wilson v. Kennedy*, 1 Esp. C. 245.

41. Where a written agreement subsists between the parties, though unstamped, the plaintiff cannot resort to an implied one, at least where it may now be stamped on paying the penalty. *Brewer v. Palmer*, 3 Esp. C. 213.

42. Where a bill or note is void for want of a stamp, the payee may recover on the original consideration. *Wade v. Beasley*, 4 Esp. C. 7.

43. Although a promissory note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it

may be looked at by the jury with a view to ascertain a collatera fact. *Gregory v. Fraser*, 3 Camp. 454.

44. Goods consigned to *A.* upon their arrival are landed on the defendant's wharf, the plaintiff in an action of trover may prove his title by parol, although the bill of lading which has been indorsed to him cannot be received in evidence for want of a stamp. *Davis v. Reynolds*, 1 Starkie, 115.

45. A bill, dated 2d *September*, payable twenty-one days after date and accepted, is afterwards, and whilst in the hands of the drawer, with the acceptor's consent, altered, by making it payable fifty-one days after date; on the 30th *September*, it is again, and under like circumstances, altered to twenty-one days after date, and the date brought forward to the 14th *September*. This last is a distinct transaction from the first, is in effect drawing of a new bill, and therefore a fresh stamp is requisite. *Bowman v. Nichol*, 1 Esp. N. P. C. 81.; S. C. 5 T. R. 537. Alteration.

46. Inserting words merely specifying where the bill or note is to be payable, will not vitiate it. *Trapp v. Spearman*, 3 Esp. C. 57.

47. After a bill has been accepted, substituting "date" for "sight," vitiates it, though it had been originally drawn in that form. *Long v. Moore*, 3 Esp. C. 155. n.

48. The insertion of the words "or order" after a bill has been negotiated, if in furtherance of the original intention, and with the consent of those concerned, does not vitiate. *Secus*, an alteration in the date or sum. *Kershaw and another v. Cox*, 3 Esp. C. 246.

49. *Semble*, that the only alteration that may be made in a bill of exchange without a fresh stamp, is when a mistake in the terms of it is rectified before it gets abroad into the world. *Cardwell v. Martin*, 1 Camp. 79, 180. b.

50. *A.* and *B.* for their mutual accommodation, exchange acceptances, the bill accepted by *A.* being made to fall due sooner than that accepted by *B.* *A.* having kept the bill payable to his order twenty days in his possession without negotiating it, alters the date of the bill with the consent of *B.*, so as to postpone the payment twenty days, and then indorses it to *C.* In an action at the suit of *C.* against *B.*, held, that by this alteration, without a fresh stamp, the bill was vitiated. *Cardwell v. Martin*, 1 Camp. 79, 180. b.

51. Words written on a bill, which do not affect the responsibility of the parties, will not vitiate it. *Marson v. Petit*, 1 Camp. 82. n.

52. *A.* and *B.* for a debt due to *C.* agree to give him a bill of exchange to be drawn by *A.* and accepted by *B.*; instead of this they send him a promissory note made by the one, and indorsed by the other, which he immediately returns to be altered into a bill of exchange according to the agreement. The instrument so altered is a valid bill of exchange without a fresh stamp, as it had not been negotiated in the shape of a promissory note, and the alteration may be considered as a mere correction of a mistake. *Webber v. Maddocks*, 3 Camp. 1.

53. Where there is a policy on goods by ship or ships to be there-after declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials, he may afterwards, in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters, and without a fresh stamp. *Robinson v. Touray*, 3 Camp. 158.

54. An accommodation bill payable to the drawer's order cannot be altered after acceptance, and an attempt to negotiate it, and before it is actually negotiated. *Calvert v. Roberts*, 3 Camp. 343.

55. The alteration of a bill of exchange by the drawee after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, renders the bill void: *Outhwaite and another v. Luntley*, 4 Camp. 179.

56. If after a bill of exchange is delivered by the drawer to the payee, its date is altered by an agreement between the payee and the drawee before acceptance, it is void as against all the parties. *Walton v. Hastings*, 4 Camp. 223.

57. *A.* being indebted to *B.* draws a bill of exchange upon *C.* payable to *B.* two months after date, and upon presentment of the bill by *B.* to *C.* for acceptance, the date is altered at the instance of *C.* without any communication with *A.* *B.* cannot recover against *C.* on his acceptance for want of a new stamp. And, *semble*, if *A.* had assented to the alteration, a new stamp would still have been necessary. *Walton v. Hastings*, 1 Starkie, 215.

58. *A.* draws a bill of exchange upon *B.* payable at three months, for a debt due from *B.* to *A.*; on the delivery of the bill to *B.* for acceptance, *B.* requests that four months may be substituted for three, and afterwards, by the assent of *A.*, the alteration is made. A new stamp is not requisite. *Kennerly v. Nash*, 1 Starkie, 452.

59. After a bill of exchange has been accepted, and whilst it remains in the hands of the payee, he alters it, by making it payable at a particular place, this alteration will not vitiate the bill. *Jacobs v. Joseph, Hart*, 2 Starkie, 45.

60. A promissory note is signed by *A.* and subsequently by *B.*, whilst in the hands of the payee as surety for *A.*; unless such signature of *B.* is in virtue of a previous agreement at the time of making the note, the note will be void without an additional stamp. *Clerk v. Blackstock*, 1 Holt, 474.

Apprentice  
indenture.

61. An indenture of apprenticeship is not void by 8 Ann. c. 9., although it was originally agreed between the master and apprentice's father that a premium of 20*l.* should be paid; and the master afterwards, to reduce the amount of the duty, agrees to take 19*l.* 19*s.* 6*d.*, which is the sum inserted in the indenture, and actually paid. *Shepherd v. Hall*, 3 Camp. 180.

Evidence.

62. Against a party who refuses, after notice, to produce an agreement, it is to be presumed that it is stamped; but he may prove the contrary. *Crisp v. Anderson*, 1 Stark. 35.

Collateral purposes.

63. An illegal policy of insurance on lottery tickets may be read in evidence, without being stamped. *Holland v. Duffin, Peake*, 58.

64. A copy of a newspaper may be read in evidence, though not stamped according to the act of parliament. *Rex v. Pearce, Peake*, 75.

65. It seems that an indorsement by a sheriff's officer on his warrant, that he has received the levy money, is evidence of the fact, without being stamped as a receipt. *Perchard and another v. Findall*, 1 Esp. C. 396.

66. An indorsement on a deed after its execution, controuling its terms, need not be stamped. *Herne and another v. Hale*, 3 Esp. C. 237. *sed quære*.

67. Although a receipt for the payment of a bill on unstamped paper is not admissible in evidence, yet the fact of payment may be proved by a witness who saw the money paid; and even such an unstamped receipt may be shown to the witness, as a memorandum to refresh his memory. *Rambert v. Cohen*, 4 Esp. C. 213.

68. A writing offered in evidence to prove, that the condition of a bond

bond has been broken, is admissible without a stamp, though it is in the form of an agreement or a promissory note. *Carter v. Bond*, 4 Esp. C. 253.

69. An instrument not given in evidence as such, but as proof of a collateral fact, need not be stamped. *Dover v. Maestaer*, 5 Esp. C. 92.

70. A receipt, as for interest money, indorsed on an unstamped note, may be used as presumptive evidence that a principal sum of an amount, to warrant that interest, was then due. *Manley and wife v. Peel*, 5 Esp. C. 121.

71. If there are two parts of a written agreement, both executed at the same time, but the one stamped and the other unstamped, the unstamped part is receivable as secondary evidence of the contents of the stamped part. *Waller v. Horsfall*, 1 Camp. 501.

72. A receipt for the price of a horse, containing a warranty of soundness, may be read in evidence to prove the warranty, without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407.

73. In an action for not delivering goods made by the defendant for the plaintiff, in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may be read in evidence without a stamp. *Ingram v. Lea*, 2 Camp. 521.

74. Where indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written upon, such receipts written on an unstamped piece of paper, annexed to the bond, may be read in evidence. *Orme v. Young*, 4 Camp. 336.

75. A written notice of the dissolution of a partnership, reciting the dissolution, and signed by the parties in order to its insertion in the Gazette, may be read in evidence to prove notice of the dissolution, although it has not been stamped. *Jenkins and another v. Blizzard and another*, 1 Starkie, 418.

76. The plaintiff having signified by a printed prospectus, the terms on which he is ready to engage to perform particular services, may, in an action against one who has employed him to render those services under a parol agreement, read the printed prospectus to show what the terms were, although it is not stamped. *Edgar v. Blick*, 1 Starkie, 464.

77. A letter read to prove a contract of marriage need not be stamped. *Orford v. Cole*, 2 Stark. 351.

78. *A.* brings an action against *B.* for the price of a gun ordered by the latter; he may read in evidence, for a collateral purpose, part of a letter written by *B.* to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an agreement. *Forsyth and others v. Jervis*, 1 Starkie, 437.

79. In an action for work and labour, a proposal on the part of the defendant, which was not finally acceded to, containing an estimate of the amount of the work, may be read in evidence by the defendant, although it be not stamped. *Peniford v. Hamilton*, 2 Stark. 475.

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## STARCH.

Hair powder made of starch ground fine still remains starch; and packages of more than twenty-eight pounds weight removed from one place to another must be marked starch. *Aitcheson v. Madock*, Peake, 162. Hair powder.

## STOCK.

Sale of.

A cheque given for stock sold is lost by the vendor in going home from the Stock Exchange. The purchaser is immediately informed of this fact, but refuses to pay without an indemnity. Four months after, the bankers on whom the cheque was drawn stop payment, with sufficient money to answer it of the drawer's in their hands. Held, that under these circumstances an action would not lie for the price of the stock. *Bevan v. Hill*, 2 Camp. 381.

## STOCK JOBBING.

What contracts are illegal.

1. *Omnium*, even before the scrip receipts are in the market, is stock within the meaning of the stock-jobbing act, 7 Geo. 2. c. 8. *Brown v. Turner*, 2 Esp. C. 631.

What not.

2. The statute 7 Geo. 2. c. 8. only prohibits gambling in the stocks; and therefore does not invalidate an agreement for a different purpose. *Saunders v. Davison* and another, 2 Esp. C. 698.

3. Dealing in lottery produces, is not within the stock-jobbing acts. *Mortimer v. Salkeld*, 4 Camp. 44.

4. An agreement for selling out *omnium* to be replaced in stock, is not illegal. *Oliverson v. Coles* and others, 1 Starkie, 496.

## STOPPAGE IN TRANSITU.

In what cases the right exists.

1. The right to stop *in transitu* continues until the goods arrive at their journey's end, (where shipped until the voyage is terminated), and cannot be divested by the consignee's previously taking possession. *Holst v. Pownal* and another, 1 Esp. C. 240.

2. By the lodgment of goods in the King's stores to secure the duties thereon, the right to stop *in transitu* is not divested, since they are in the possession, not of the consignee, but the law. *Northey and another v. Field*, 2 Esp. C. 613.

3. The right of a consigner to stop goods *in transitu* is not divested by the goods, while in their transit, being attached by process out of the court of the mayor of London, at the suit of a creditor of the consignee. *Smith v. Gross*, 1 Camp. 282.

4. If *A.* sells goods to *B.* and according to *B.*'s directions sends them to *C.*, a wharfinger, to be by him forwarded to *B.*; while they are in *C.*'s hands, they may be stopped *in transitu* by *A.* *Smith v. Gross*, 1 Camp. 282.

5. *A.* being indebted to *B.* on the balance of accounts, including bills of exchange still running, accepted by *B.* for *A.*, consigns goods to *B.* on account of this balance. Held, that *A.* has no right to stop the goods *in transitu* upon *B.* becoming insolvent before the bills are paid. *Vertue and another v. Jewell*, 4 Camp. 31.

6. Although goods are delivered at the packer's of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they may still be stopped *in transitu*. *Loeschman v. Williams*, 4 Camp. 181.

7. A particular parcel of goods in the possession of a warehouseman,

man, is sold at so much per cwt., the weight of the whole being uncertain, to be paid by a bill of exchange. The vendor gives the purchaser an order to the warehouseman to weigh and deliver the goods, which are lodged with the warehouseman; but before the goods are weighed, the purchaser becomes insolvent. The vendor has a right to stop them *in transitu*. Withers and another v. Lyfs and others, 4 Camp. 237. S. C. 1 Holt, 18.

8. When the master of a ship receives goods on board and gives a receipt for them, it is his duty not to deliver the bill of lading except to the person who can give the receipt in exchange. A. sells goods to B. to be delivered free on board a particular ship; he loads them on board and takes a receipt from C. which purports that the goods were received "for and on account of A." Before the delivery B. had sold the goods to D., who, without the knowledge and consent of A., obtains a bill of lading from C.; B. becomes insolvent. Held, that A. is entitled to stop the goods *in transitu*. A.'s right would have been the same, although the receipt had not contained the restrictive words, but had been in the general form. Craven and others v. Ryder, 1 Holt, 100.

9. A. being in bad circumstances, goes to Glasgow, and obtains goods from B., paying for them by a bill upon a house in London, which house he knows to be insolvent. The goods are shipped at Leith, the invoice and receipt made out to it, and they are afterwards delivered to a wharfinger in London, who receives a notice from the original vendor, B., to hold them for him. A. becomes a bankrupt. In trover by A. against the wharfinger for the benefit of his assignees. Held, that B.'s right of stoppage *in transitu* was gone, but that there might still be a question for the jury, whether the sale was not made under such gross circumstances of fraud as to vacate the contract altogether. Nobb v. Adams, 1 Holt, 248.

10. A., in London, orders goods of B. at Manchester; B. forwards them by a carrier to London. Whilst they are on their transit, B. hears of A.'s insolvency, and directs the carriers to stop them; and for this purpose he makes out a new invoice to D., which he transmits to the office of the carrier in London. The goods, by a mistake of the carrier, are delivered to A., who becomes a bankrupt; his assignees claim to retain them: Held, that B. had a right to recover them in an action of trover against the assignees of A. Litt and another v. Cowley and others, 1 Holt, 338.

11. A general remittance from a debtor to a creditor, in payment of his debt, sent for a particular purpose, cannot be stopped *in transitu* by the debtor, on the creditor becoming bankrupt. Smith and others v. Bowles and others, 2 Esp. C. 578. In what note

12. The shipping a consignment by a vessel chartered by the consignee, is a complete delivery to the consignee, so as to divest the right of stoppage *in transitu*. Boethlinek v. Schneider, 3 Esp. C. 59.

13. Goods are consigned to A., residing at K., by a vessel trading to Y., whence they are to be forwarded to X. On their arrival at Y. the consignee takes possession of them: Held, that thereby the right to stop *in transitu* was divested. Wright v. Lawes, 4 Esp. C. 82.

14. Any act of ownership, duly exercised over the property, divests the right of stoppage *in transitu*. Wright v. Lawes, 4 Esp. C. 85.

15. Where on a contract of sale the buyer, though an agent, is considered as principal contractor, his taking possession divests the vendor's right to stop *in transitu*. Leeds v. Wright, 4 Esp. C. 234.

16. If,



16. If, after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them *in transitu*. *Harry v. Mangles*, 1 Camp. 452.

17. When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them *in transitu* is gone, and the wharfinger is bound to hold them as the agent of the purchaser. *Harman v. Anderson*, 2 Camp. 243. *Et per curiam in Banco*. The same effect is produced by the delivery note being lodged with the wharfinger, without a transfer in his books. *Ib*.

18. The right of an unpaid consignor to stop *in transitu* is not taken away by an assignment of the bill of lading, for a valuable consideration to a third person, with notice of the insolvency of the consignee. *Vertue and another v. Jewell*, 4 Camp. 31.

19. Goods being entered in the books of the *West India Dock Company*, in the name of *A.*, he receives the usual cheque for them, which, having sold the goods to *B.*, he indorses and delivers to him. *B.* sells the goods, and delivers the cheque to *C.* on credit. On *C.*'s insolvency, *A.* cannot lawfully take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the Dock Company. *Spears v. Travers and another*, 4 Camp. 251.

20. If the purchaser of goods to be paid by bill, after giving his acceptance, during the time of credit, and while the goods are *in transitu* sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods *in transitu* is taken away. *Davis v. Reynolds*, 4 Camp. 267.; *S. C.* 1 Starkie, 115.

21. An order sent by the vendor to the wharfinger to deliver goods to the vendee, is sufficient to pass the property to the vendee, provided nothing remains to be done, but to make the delivery; but if any thing remain to be done, for example, weighing, &c. the property does not pass, and the right of stoppage *in transitu* is not defeated till that be done. *Wytners v. Lys*, 1 Holt, 18.

22. *A.* having some coffees in the *West India Docks*, employs a broker to sell them; the broker informs him that he has found a purchaser, and requires to be put in possession of the dock warrants. *A.* delivers them to the broker, indorsed in blank, upon receiving his (the broker's) cheque for the price of the coffee. The broker then sells the coffee to the plaintiffs, and receives immediate payment, upon handing over the dock warrants. The broker's cheque, given to *A.*, is dishonoured, and *A.* immediately stops the goods in the Dock warehouse. Held, that the plaintiffs had a right to recover in trover against *A.*, on the ground that the delivery of the dock warrants by the broker to the plaintiffs, upon payment made to him, constituted a complete transfer by the custom and usage of trade; and defeated the right of stoppage *in transitu*. *Zwinger and another v. Zарауда*, 1 Holt, 395.

23. *A.*, having entered goods in the books of the *West India Dock Company*, received two dock warrants or delivery orders, in blank for them, which he delivered to *B.* on a sale of the goods to him, and *B.* having sold the goods to *C.*, delivered the dock warrants to that person, and *C.* employed *D.* as his broker, to effect a sale of the  
the

the goods, and delivered over the dock warrants, one of which was signed by C., but the blank intended for the name of the purchaser remained, and D., after having effected a sale on credit, delivered the dock warrants to the purchaser, one of which (viz. the one in which the blank for the name of the purchaser remained,) the purchaser deposited with E., as a security for money advanced on the faith of that warrant. Held, that C. had no right to put a stop upon the goods, in the event of the purchaser not paying for them, since the transfer of the warrant by D., his broker, operated as a constructive delivery of the goods, so as to defeat C.'s right of stoppage *in transitu*. *Keyser v. Susc*, 1 Gow. 58.

24. Although goods are stopped *in transitu*, the vendor, after the credit has expired, may recover for them, under a count for goods bargained and sold, if he was ready to deliver them on the price being paid. *Kymer v. Suwercropp*, 1 Camp. 109. 180. c.

Effects of exercising the right.

## TENDER.

1. A tender demanding change is not good. *Watkins v. Robb*, 2 Esp. C. 711.

What is not a valid tender.

2. A tender as of a gratuity, repudiating the notion of legal right, is not a valid tender. *Simmons v. Wilmott and others*, 3 Esp. C. 91.

3. To a valid tender it is essential that the money be produced, unless the plaintiff dispense with the production, as, by saying that the defendant need not produce the money, as he would not accept it; a refusal to take the sum offered, on the ground that more was due, is not sufficient. *Dickinson v. Shee*, 4 Esp. C. 68.

4. That a tender, without actually producing the money, may be valid, it must be proved, not only that the creditor refused it, but that the party had it ready to produce. *Glasscott v. Day*, 5 Esp. C. 48.

5. A tender upon condition that a receipt in full be given, is not good. *Glasscott v. Day*, 5 Esp. C. 48.

6. It is not a good tender of a fractional sum for the debtor to offer the creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee v. Davis*, 3 Camp. 70.

7. An offer to pay a sum of money, to be accepted as the whole balance due, where a larger sum is claimed, does not amount to a legal tender. *Evans v. Judkins*, 4 Camp. 156.

What is not a legal tender.

8. If A. be indebted to several persons in different sums of money, and when they are all assembled together, tenders them one gross sum, sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. It is not necessary to produce the money tendered when the creditor insists on more being due. *Black v. Smith, Peake*, 88.

What is.

9. If on a tender being made the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt. *Cole v. Blake, Peake*, 179.

10. A tender in Bank of *England* notes is good, unless objected to as such. *Brown v. Saul*, 4 Esp. C. 267.

What a legal tender.

11. The

11. The tender of a larger sum if not refused on that account is good for the less. *Holland v. Phillips*, 6 Esp. C. 46.

12. A tender of a bank note in payment of a fractional sum, is good if the creditor object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank note and the fractional sum. *Saunders v. Graham*, 1 Gow, 121.

Subsequent demand.

13. To avoid a tender by subsequent demand, the demand must be of the exact sum tendered. *Coore v. Callaway*, 1 Esp. N. P. C. 115. 1 C. N. P. C. 181.

14. The demand of a debt, to do away the effect of a tender, must be by some one authorized to give the debtor a discharge. *Colcs v. Bell*, 1 Camp. 478. n.

15. After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants. *Peirse v. Bowles and another*, 1 Starkie, 323.

Pleadings.

16. If to a plea of tender the plaintiff replies a subsequent demand and refusal, it is incumbent on him to prove, that after the tender admitted in the pleadings, he demanded of the defendant the exact sum specified, as having been before tendered and refused. *Spybey v. Hide*, 1 Camp. 181.

17. Held, that after a plea of tender the plaintiff cannot be non-suited. *Harding v. Spicer*, 1 Camp. 327.

## THAMES.

Mooring barges.

The right as regulated by custom of mooring barges in the Thames at low water, is, for one tide at the piles in front of the wharf, and not at the wharf itself, though there are no piles, unless obliged by distress. *Wyatt v. Thompson*, 1 Esp. C. 252.

## THEATRE.

What houses must be licensed.

1. A house kept for private dancing, and not the exhibition of performers, must nevertheless be licensed pursuant to statute 25 G. 2. c. 36. since the public morals may be as equally endangered by the abuse of the one as the other. *Clarke v. Searle*, 1 Esp. N. P. C. 25.

2. A public tea-room in which musical performances are regularly exhibited, must be licensed pursuant to statute 25 G. 2. c. 36. *Bellis v. Beal*, 2 Esp. C. 592.

What not.

3. A room kept by a dancing master for the instruction of his scholars and subscribers, and to which persons are not indiscriminately admitted, need not be licensed under statute 25 G. 2. c. 36. *Bellis v. Burghall*, 2 Esp. C. 722.

4. A room used for public dancing on a particular festival only, need not be licensed within statute 25 G. 2. c. 36. *Shutt v. Lewis*, 5 Esp. C. 128.

The offence of keeping an unlicensed house when complete.

5. To complete the offence for keeping an unlicensed house for dancing and music under statute 25 G. 2. c. 36., it is not necessary that any thing should be taken for admission. *Archer v. Willingnie*, 4 Esp. C. 186.

TIME.

## TIME.

1. The rule is invariable that months in acts of parliament mean Month.  
lunar months, unless the context requires a different construction.  
Lacon and another v. Hooper and another, 1 Esp. C. 249.

2. In mercantile contracts, months are to be reckoned as calendar,  
not lunar. Jolly v. Young, 1 Esp. N.P. C. 186.

3. Where goods are seized under a *fi. fa.* the same day that the Fraction of a  
party commits an act of bankruptcy, it is open to enquire at what day.  
time of the day the goods were seized, and the act of bankruptcy  
was committed; and the validity of the execution depends upon the  
priority. Sadler v. Leigh and another, 4 Esp. Camp. 197.

## TITHE.

1. The tithe of hay is to be set out, not in the swarth, but in the Hay.  
cock. Moyes v. Willet, 3 Esp. C. 31.

2. Before setting out the tithe of hay, the occupier of the soil is  
bound at common law to tedd the grass, (or throw it abroad from  
the swarth and gather it together again), and then to make it into  
cocks; after which, the tithe is to be set out, and the parson must  
make it into perfect hay. Newman v. Morgan, 1 Camp. 305.

3. A parson in carrying his tithes may use any road upon the pre- Removal of.  
mises used by the occupant, though there is a public road equally  
convenient. Cobb v. Selby, 6 Esp. C. 103.

4. Unless tithes have been duly set out, the parson is not liable for  
not removing them after notice. Moyes v. Willet, 3 Esp. C. 31.

## TITLE DEEDS.

A defendant who has worked coal-mines without interruption in Production of.  
pursuance of an agreement with the owner cannot, upon the trial of  
an action against him for a breach of the agreement, compel a third  
person to produce his title deeds, by virtue of which he is entitled  
to the legal estate in which the premises are situated as a trustee.  
Roberts v. Simpson, 2 Starkie, 203. See in tit. Action (Evidence.)

## TOLERATION ACT.

1. *German* Lutherans are within the protection of the Toleration Who are with-  
Act. Rex v. Hube, Peake, 132. in.

2. Parol evidence of the oaths required by the Toleration Act Oath.  
having been taken, is not admissible. It is not necessary to prove  
the taking of those oaths in an indictment for disturbing the congre-  
gation. Rex v. Hube, Peake, 132.

3. It is no defence to an indictment on the Toleration Act, that Indictment.  
the defendant entered the chapel for the purpose of asserting his  
right to the clerk's reading-desk. Rex v. Hube, Peake, 132.

## TOLL.

## TOLL.

Implied  
right to.

*Quære*, if tolls can be claimed under a modern grant of a liberty to hold a market, &c. and to receive the accustomed dues and tolls, &c., but to which grant no specific tolls are annexed. *Lowdon v. Hierons*, 1 Holt, 747.

## TRADE.

Importation of  
wool.

1. A foreign built ship, *British* owned, was authorized by 43 Geo. 3. c. 153. s. 13. to import into *Great Britain* the articles therein enumerated; but that statute, which permits the importation into *Great Britain*, in such a ship of "all sorts of wool" does not extend to *cotton*. *Pearce and others v. Cowie*, 4 Camp. 363.; S.C. 1 Holt, 69.

What trades are  
within the sta-  
tute of appren-  
ticeship.

2. The statute 5 Eliz. prohibiting the exercising trades without having served an apprenticeship, only applies to trades then in use; not therefore to the trade of a coachmaker. *Pride v. Stubbs*, 6 Esp. C. 131.

3. An action will not lie on 5 Eliz. c. 4. for setting to work a person who had not served an apprenticeship in the business of a coachmaker, that business not being known in *England* when the statute passed. *Pride q. t. v. Stubbs*, 2 Camp. 397.

4. A trade is not within 5 Eliz. c. 4. although several of its intermediate operations were known and practised in *England* when the act passed, if its ultimate object be a machine or manufacture, subsequently introduced or invented. *Martins v. Galloway*, 3 Camp. 121.

What shall be  
an offence  
against the  
statute.

5. A master workman employs in a trade within 5 Eliz. c. 4. a person who never before had worked in it, under a parol agreement to teach him the business, in consideration of a premium, and to pay him weekly wages. This is not an apprenticeship within the meaning of the statute; and the master is thereby subject to a penalty for setting to work in his trade one who had not served therein seven years as an apprentice. *Beal q. t. v. Geal*, 2 Camp. 1.

6. It is an offence against 5 Eliz. c. 4. s. 31. to employ an unqualified person in any substantive part of a trade, within the statute, although he is incapable of doing the more difficult parts of the business, and never finishes any one article. If a particular trade was carried on in 5 Eliz., it is within the provisions of the above statute, although the mode of carrying it on has been materially altered. *Pratt v. Fraser*, 3 Camp. 14.

What not.

7. A man who has been engaged as chief clerk, and manager to a manufacturer for seven years, has served a sufficient apprenticeship within the 5 Eliz., though he was never engaged in the manual labour of the business. *Smith v. the Armourers' Company*, Peake, 148.

8. One who, without having served an apprenticeship carries on a trade as trustee for a minor, and who does not interfere in conducting it, is not liable to the penalties of the statute 13 and 14 Car. 2. c. 15. s. 2. *Meazcan v. Pearsall*, 6 Esp. C. 1.

9. A man is not liable to penalties under 5 Eliz. c. 4., as for exercising a trade without having served an apprenticeship to it, who merely exercises a trade incidentally as a branch of his general business. Therefore, a master coachmaker may lawfully keep journeymen blacksmiths in his employ, to make the iron-work of coaches, although he has not served an apprenticeship to the trade of a blacksmith. *Coward v. Maberley*, 2 Camp. 127.

10. So of a master carpenter, and journeymen sawyers. *Coward v. Maberley*, 2 Camp. 127.

11. A person merely employed as out-door man to nail on horses' shoes, made by others, is not set on work in the trade of a farrier, within the meaning of 5 Eliz. c. 4. *Hudson v. Field*, 3 Camp. 15.

12. In an action on 5 Eliz. c. 4. for setting on work, one who has not served an apprenticeship of seven years, the defendant is not liable, unless he knew that the person set on work had not served an apprenticeship, but the jury may infer that he knew this from having had the means of knowledge. *Holden v. Lawrie*, 3 Camp. 188.

13. An action on 5 Eliz. c. 4. s. 31. for setting to work a person who has not served an apprenticeship cannot be maintained, unless the unqualified person has worked by the defendant's orders one month in the county in which the venue is laid; nor is it enough that the defendant gave him orders in this county to work, and that he accordingly did work at the business above a month in another county. *Cunningham q. t. v. Watson*, 3 Camp. 249.

14. An indictment cannot be maintained on 5 Eliz. c. 4. for exercising a trade without having served an apprenticeship, unless the defendant is proved to have exercised the trade for the space of a month. *Rex v. Barnett*, 3 Camp. 344.

15. In a penal action for exercising a trade not having served an apprenticeship, the plaintiff is not obliged to prove that defendant used the trade all the time laid in the declaration, if it is said that he forfeited 40s. for each month. *Powell qui tam v. Farmer, Peake*, 57. Pleadings.

16. In an action on 5 Eliz. for setting to work a journeyman, who has not served an apprenticeship, the plaintiff cannot recover any penalty that had been incurred a year before the commencement of the suit, although the defendant continued to employ the same journeyman within the year. *Evans q. t. v. Hunter*, 2 Camp. 293.

17. *Quære*, as to the proper title of statute 5 Eliz. c. 4., which is stated differently in different editions of the statutes; where it was set out in an indictment, as given by Ruffhead, the judge refused to direct an acquittal for a variance, on production of a copy of the act printed by the king's printer, in which it is given differently. *Rex v. Barnett*, 3 Camp. 344.

## TREASON.

1. An objection to a witness, on the ground of misdescription, must be taken in the first instance. *Rex v. Watson*, 2 Starkie, 158. List of witnesses.

2. A witness in high treason is described in the list delivered to the prisoner, under the statute, as lately abiding at a specified place. Upon examination of the witness upon the *voir dire* it appears that he has had a different and later place of residence, the description is not sufficient. *Rex v. Watson*, 2 Starkie, 116.

## TRESPASS.

1. A shop-keeper may maintain trespass for taking goods sent to him on sale or return. *Colwill v. Rees*, 2 Camp. 575. By whom maintainable.

2. An equitable title is not sufficient in trespass, where the party has not been in possession. *Woodward v. Larking*, 3 Esp. C. 288. By whom not.

3. Tenant

3. Tenant for years cannot maintain trespass *de bonis asportatis* for timber cut down on the demised premises. *Evans v. Evans*, 2 Camp. 491.

4. One who has accepted rent from a tenant in possession, who has atoned to him under an order in chancery, cannot treat the tenant as a trespasser. *Doe ex dem. Jolliffe. v. Sybourn*, 2 Esp. C. 667.

Abuse of a  
right.

5. If a party having a right to enter premises for a particular purpose, enters for another, he is a trespasser. *Fitch v. Fitch*, 2 Esp. C. 544.

6. Trespass will not lie for an irregular distress, where the irregularity complained of is not in itself an act of trespass, but consists merely in the omissions of some of the forms required in conducting the distress, such as procuring goods to be appraised before they are sold. The true construction of the provision in 11 Geo. 2. c. 19. s. 19. that the party may recover a compensation for the special damage he sustains by an irregular distress: "in an action of trespass or on the case," is, that he must bring trespass case, if it be in itself the subject matter of an action on the case. *Missing v. Kemble*, 2 Camp. 115.

Licence.

7. One who sees another building on his premises without objection cannot treat him as a trespasser. *Neale ex dem. Leroux v. Parkin and another*, 1 Esp. C. 229.

Case or trespass.

8. If an injury is received from the immediate, though unintentional, act of another, the remedy is trespass, and not case; and the court of K. B. will not permit this doctrine to be questioned on a motion for a new trial. 2 Camp. 465.

9. Trespass and not case is the proper remedy for an injury from collision between the plaintiff's and defendant's carriages, occasioned by defendant's negligence. *Sheldrick v. Aberly and another*, 1 Esp. N. P. C. 55.

10. If the owner of a ship, being himself on board, and standing at the helm unintentionally runs her against another ship, from unskillful management, the remedy is trespass and not case. *Covell v. Laming*, 1 Camp. 497.

11. If the owner of a chattel gratuitously permit another person to use it, the owner may maintain trespass for an injury done to it, while it is so used. *Lotan v. Cross*, 2 Camp. 464.

12. Where a principal is liable for his agent's misconduct he can only be sued by action upon the case, notwithstanding the agent may be liable as a trespasser *vi et armis*. *Leame v. Bray*, 5 Esp. C. 18.

13. If the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse against the owner of the cart is case and not trespass. *Hall v. Pickard*, 3 Camp. 187.

14. Where the defendant nails to his own wall a board which overhangs the plaintiff's close, the remedy seems to be case and not trespass. *Pickering v. Rudd*, 4 Camp. 219. S. C. 1 Starkie, 56.

15. *A.* having recovered damages against *B.* for driving hold-fasts into *A.*'s wall in order to support a nuisance, brings a second action of trespass for the continuance. *Semble*, the form of the second action should be case and not trespass. *Lawrence v. Obee*, 1 Starkie, 22.

16. If *A.* procure a constable to arrest *B.* on a charge which afterwards

wards turns out to be groundless, *quare*, whether *B.*'s remedy against *A.* is an action of case or trespass. *Stonchouse v. Elliot*, 1 Esp. C. 272.

17. If *A.* procure a constable to arrest *B.* on a charge of felony which is unfounded, trespass lies against *A.* *White v. Taylor* and another, 4 Esp. C. 80. Parties to action.

18. Where a post-chaise is let to hire, the relation of master and servant continues between the driver and the owner, who therefore and not the passenger, will be answerable for the driver's want of care: hence the owner's remedy is trespass, not case, for forcible injury to the chaise whilst hired. *Dean v. Branthwaite*, 5 Esp. C. 35.

19. If *A.* without authority arrest *B.* and commit him to the custody of *C.*, (supposing *C.* to be liable for receiving him) the trespass is joint in both, since *C.* adopts the act of *A.*; therefore they may be sued jointly. *Hardy v. Murphy* and another, 1 Esp. C. 294.

20. Under the *alia enormia* in trespass, no facts can be given in evidence which might, consistently with decency, be stated in the declaration. *Lowden v. Goodrick*, Peake, 46. Pleadings.

21. In trespass and false imprisonment, the plaintiff cannot give evidence of his health being injured unless laid under a *per quod*; the common conclusion, that he became and was sick, weak, &c. is not sufficient. *Pettle v. Addington*, Peake, 62.

22. If an English merchantman be seized as prize by the commander of a king's ship, an action at law cannot be maintained against him for so doing, although he released her without instituting any proceedings against her in the Admiralty court; and if an action of trespass be brought against him, it is enough for him to plead the general issue, and to show that he seized the vessel as prize without pleading or proving that he had probable cause. *Faith v. Pearson*, 4 Camp. 357.

23. Where the plaintiff is in the actual occupation of the close, the defendant cannot, in an action of trespass, give evidence of property in a stranger, under the general issue. *Philpot v. Holmes*, Peake, 67.

24. A distress for rent taken *off* the demised premises, cannot be given in evidence under the general issue in trespass, since the statute 11 Geo. 2. c. 19. is confined to distresses made *on* the premises. *Vaughan v. Davis*, 1 Esp. C. 257.

25. To trespass for unmooring the plaintiff's barge, the defendant having pleaded merely the general issue, cannot give in evidence that he removed it from a situation of danger by the plaintiff's authority; or that, being frozen to the barge of a third person which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of safety. *Milman v. Dolwell*, 2 Camp. 378.

26. In trespass for running with a cart against plaintiff's chaise, the defendant cannot give in evidence under not guilty, that the cart and the chaise were travelling on the high road in opposite directions, and that the collision between them happened from the negligence of the plaintiff, or from inevitable accident. *Knapp v. Salsbury*, 2 Camp. 500.

27. In trespass for taking goods, where the defence is, that they were taken as a distress for rent, having been clandestinely removed from the premises; this must be specially pleaded. *Furneaux v. Fotherby* and another, 4 Camp. 136.



28. *A.* executes a warrant of attorney to *B.* to enter up judgment and take out execution with a defeasance on payment of a certain sum of money; *B.*, after payment of this money, enters up judgment and takes *A.* in execution, *A.* moves the court to set aside the judgment and execution, and after a rule *nisi* has been obtained, the whole is referred to a barrister, who awards that nothing was due to *B.* when he entered up the judgment, and that the judgment and warrant of attorney shall be set aside: *A.* in an action of trespass and false imprisonment against *B.*, who pleads the general issue only, is entitled to recover. *Rogers v. Popkin*, 2 Starkie, 404.

29. To trespass for breaking and entering a house and staying therein three weeks, the defendant pleads a justification as to breaking, and entering, and staying in the house twenty-four hours. The plea covers the whole declaration. *Monprivatt v. Smith*, 2 Camp. 175.

30. If to trespass by a tenant against a landlord for turning him out of possession, the defendant pleads a fact, by which the lease was forfeited, and the plaintiff replies generally *de injuriâ*; when the fact is proved, by which the lease is forfeited, the plaintiff cannot give in evidence a waiver of the forfeiture; but he ought to have replied this specially in avoidance of the plea. *Warral v. Clare*, 2 Camp. 629.

31. Trespass for cutting down a *Virginian* creeper; plea removal, because it was doing damage to the defendant's premises. Replication, that the defendant used greater force and violence, and did greater damage than was necessary. On issue joined upon this replication, the plaintiff cannot go into evidence to show the *quantum* and nature of the damage done to the premises. *Pickering v. Rudd*, 1 Starkie, 56.

32. If *A.* be in possession of part of a house, and *B.* of the other part, and an officer enter into *A.*'s part under a writ against *B.*'s goods, which are not there, *A.* may maintain an action against the officer for breaking and entering his house, and need not make any new assignment to a justification under the writ against *B.* *Fallon v. Anderson*, Peake, 110.

New assign-  
ment.

33. The day in a declaration in trespass is immaterial; therefore a justification at any other time answers the declaration, and if the plaintiff means to insist that the defendant was guilty of a trespass on that day as well, he must new assign. *Randle v. Webb*, 1 Esp. N.P.C. 38.

34. To trespass for breaking and entering the plaintiff's house, and making a noise and disturbance therein, the defendant pleaded a licence, to which the plaintiff replied *de injuriâ*. Held, that the plea was supported by evidence, that the plaintiff kept a billiard-table in the house, at which all persons were usually permitted by him to play, at regulated prices; and that the defendant entered the house for the purpose of going to the billiard-room, although, while in the house, he was guilty of a trespass in assaulting the plaintiff. *Ditcham v. Bond*, 3 Camp. 524.

## TRIAL.

Notice of.

1. Notice of trial may be given in K. B. for the adjournment-day in *London*, and it is sufficient to give such notice eight days in country

try causes, and four days in town causes, before the first sittings after term. R. G. E. 1811. 2 Camp. 12.

2. The court will put off the trial on the affidavit of the defendant's attorney, that a material witness is kept out of the way by the plaintiff. *Duberley v. Gunning, Peake*, 97. Putting off.

3. An application may be made to a judge at *Nisi Prius* to put off the trial of an issue directed by the Lord Chancellor. *Buxton v. Lawton*, 4 Camp. 163.

4. The court will not put off a trial upon motion at *Nisi Prius*, in order to enable the plaintiff to amend his declaration, by omitting the profert of the bond on which the action is brought. *Paine v. Bustin*, 1 Starkie, 74.

5. The rule, that where a trial is put off, on the cause being called on upon the defendant's application, he must pay the costs of the day, applies as well to criminal as civil causes; but unless the prosecutor's name is indorsed on the bill, he is not entitled to any costs on his own account. *Rex v. Doyle*, 1 Esp. N. P. C. 125.

6. At *Nisi Prius* in K. B., the plaintiff cannot apply to put off the trial of his cause from sittings to sittings, but may from one day in the sittings to another. *Ansley v. Birch*, 3 Camp. 333.

7. Counsel, although retained for the plaintiff, cannot withdraw the record till a brief is delivered. *Abithol v. Beneditto*, 2 Camp. 487. Withdrawing record.

8. The court will not grant a new trial after a defendant has been acquitted upon an indictment, although the acquittal was founded upon a misdirection by the judge. *Rex v. Cohen and another*, 1 Starkie, 516. New trial.

9. A judge at *Nisi Prius* will not try a cause out of its order, for the purpose of preventing an injunction in equity against proceeding to trial. *Goldschmidt v. Marryat*, 1 Camp. 559. Order of trial.

10. One indictment against *A.* and another against *A. and B.* are entered for trial in the above orders; special juries having been struck in both, and both having been entered as common jury causes, the prosecutor cannot, by withdrawing the first record, reverse the order of trial. *Rex v. Houlditch and another*, 1 Starkie, 63.

11. Rule for special jury in *Middlesex* and *London* must be served day preceding adjournment day, and cause then marked as special day in marshal's book. R. G. H. 2 Camp. 12. Special jury causes.

12. Rule as to the appointment of particular days for special jury causes not defended. 1 Starkie, 31. *Ld. Ellenb.*

13. If a defendant, who has obtained and saved a rule for a special jury, take no further steps upon it, the plaintiff will be entitled to have the cause tried in its regular order as a common jury cause, and the court will not afterwards relieve the defendant, except under very special circumstances. *Farren v. Richards*, 2 Starkie, 369.

14. The certificates under 24 G. 2. c. 18., that a cause was proper to be tried by a special jury must be granted, if at all, immediately after the trial. Therefore, an application for such certificate made the day after the trial was held too late. *Waggett v. Shaw*, 3 Camp. 316.

15. At the assizes, if business is not begun on the commission day, causes must be entered with the marshal before the sitting of the court on the first day of business. *Skeye v. Voyce*, 3 Camp. 365. Practice at the trial.

16. In trespass *quare clausum fregit*, if the defendant pleads as coming with force and arms, and whatever else is against the peace,

not guilty, and as to the residue of the trespasses, a justification which is denied by the replication; at the trial he has a right to begin and to have the general reply. *Hodges v. Holder*, 3 Camp. 366.

17. In ejectment, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, the defendant, on admitting the title of the lessor of the plaintiff under the will, has a right to begin and to have the general reply. *Doe ex dem. Corbett v. Corbett*, 3 Camp. 368.

18. In an action of trespass, where the general issue is pleaded, and also special pleas are pleaded, alleging a clandestine removal to avoid a distress, the plaintiff ought to go into the whole of his case in the first instance. *Rees v. Smith*, 2 Starkie, 31.

19. Held, in *assumpsit*, for money received and on an account, that though the plaintiff, in his opening, had stated his claim to arise out of a settlement of accounts, and failed in proving the settlement, he might nevertheless recover for money received. *Murray and another v. Butler*, 3 Esp. C. 105.

20. If a party fails in the case which he has opened, he cannot resort to another. *Sherriff v. Cadell*, 2 Esp. C. 617.

21. In an action of assault and battery, if the declaration contains but one count, the plaintiff, after proving one assault, cannot waive that, and proceed to give evidence of another. *Stante v. Prickett*, 1 Camp. 473.

22. A plaintiff who fails in proving the case stated to the jury, cannot afterwards go into a new case which has not been stated. *Paterson v. Zachariah and Arnold*, 1 Starkie, 72.

23. Practice as to the opening and replying of counsel in trespass. *Jackson v. Hesketh*, 2 Starkie, 518.

24. Upon a plea in abatement for non-joinder of another as defendant in *assumpsit*, the counsel for the plaintiff is to bring evidence to sustain the plea. *Robey v. Howard*, 2 Starkie, 555.

25. After the plaintiff's case has been closed, the court will not allow him to remedy a defect in his evidence, unless it has occurred from inadvertency on the part of his counsel. *Aldred v. Halliwell*, 1 Starkie, 117.

26. Where the declaration contained thirty counts on fifteen bills of exchange, the court at *Nisi Prius* refused to compel the plaintiff to select fifteen of the counts on which to take his verdict. *Ferguson and others v. Clarke*, 2 Starkie, 442.

27. Where several defendants appear by separate attorneys, and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint. *Chippendale v. Masson and others*, 4 Camp. 174.

28. One of several defendants, against whom, on the close of the plaintiff's case, no evidence has been offered, is not entitled to an acquittal, till the whole case is ready for the jury. But, in adducing evidence in contradiction to that offered by the other defendants, the plaintiff cannot go into a new case against the first. *Huxley v. Berg and others*, 1 Starkie, 98.

29. In an action of tort against several, if there be evidence against some only, and none against others, it is discretionary with the judge at *Nisi Prius*, whether he will direct the acquittal of such defendants

ants against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. But such an intermediate acquittal is not a matter which the defendant's counsel can claim of right. *Davis v. Living and others*, 1 Holt, 275.

30. Where property is stated in one count to belong to certain persons, naming them specifically, but in another count to belong to persons unknown, and the prosecutor, by defect of evidence, cannot prove the names of the persons as described in the first count, he cannot recur to the second count, which describes the property as belonging to persons unknown. *Rex v. Robinson*, 1 Holt, 595.

31. Although an objection appear upon the record, and might be taken advantage of by motion in arrest of judgment or writ of error, yet if it be of such a nature that the action clearly cannot be maintained, the judge at *Nisi Prius* will nonsuit the plaintiff. *Sadler v. Robins*, 1 Camp. 256.

32. When there are several counsel on the same side, and a junior has begun to examine a witness, the leader may interpose, take the witness into his own hands, and finish the examination. But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 Camp. 280.

33. One issue having been taken on the plea of payment of a bond on which interest has accrued, according to the condition of the bond, the defendant is not entitled to a verdict on that issue, on proof of payment of the principal without interest. *Hellier v. Franklin*, 1 Starkie, 291.

34. On the trial of a misdemeanor, the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury; but if he conducts his defence himself, and any point of law arises, which he professes himself unable to argue, the court will hear this argued by his counsel. *Rex v. White*, 3 Camp. 98.

35. If, during the trial of a prisoner for a capital offence, one of the jurymen is taken ill, the jury may be discharged, and the prisoner tried by another jury. *Rex v. Edwards*, 3 Camp. 207.

## TROVER.

1. The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver: Held, that the plaintiff could not maintain trover for the watch on proof that the candlesticks were of base metal; his remedy was by action for the breach of warranty. *Emanuel v. Dane*, 3 Camp. 299.

When the appropriate form of action.

2. Trover lies for an undivided part of a chattel. *Watson and wife v. King*, 4 Camp. 272.; S. C. 1 Starkie, 121.

When maintainable.

3. To support trover, the plaintiff, if not actually possessed at the time of conversion, must have had the right of immediate possession. *Gordon v. Harpur*, 2 Esp. C. 465.; S. C. 7 T. R. 9.

By whom maintainable.

4. A. paid a bank of *England* note to B., who paid it to C., who presented it at the bank, where it was stopped on the ground that it had been fraudulently obtained from a former holder: Held, that although A. thereupon paid the amount of the note to C., in discharge of the debt due to him from B., A. could not maintain trover for the note against the bank of *England*. *Benjamin v. Bank of England*, 3 Camp. 417.

5. *Quære*, whether a gift of a chattel, not in the possession of the donor at the time of making the gift, will so pass the property therein, as to entitle the donee, who has never obtained possession, to maintain trover against the executor of the donor. *Spratley v. Wilson*, 1 Holt, 10.

Conversion.

6. If a carrier has goods to carry, and by mistake deliver them to a wrong person, this is such a tortious conversion as will support an action of trover at the suit of the right owner. *Youl v. Harbottle*, *Peake*, 49.

7. A person in possession of property is not guilty of a conversion by a *bona fide* refusal to deliver it until the party demanding proves that he is entitled to receive it. *Solomons v. Dawes*, 1 Esp. N. P. C. 83.

8. A neglect to deliver goods in pursuance of a contract is not a conversion; *secus*, where refused on demand. *Severin v. Keppell*, 4 Esp. C. 156.

Demand.

9. A demand of the value of the property, instead of the property in specie, is sufficient in trover. *Thompson v. Shirley and another*, 1 Esp. N. P. C. 31.

10. One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance. And such removal supersedes the necessity of proving a formal demand in an action of trover. *Forsdick v. Collins*, 1 Starkie, 173.

## TRUSTEE.

Conveyance by.

1. Where trustees are bound to convey the legal estate in an event which has happened, it will be presumed, unless the contrary appear, that they conveyed accordingly. *Bowerman v. Sybourn*, 2 Esp. C. 496.; *Godfrey v. Hudson*, 2 Esp. C. 499. n.

Liability of.

2. Trustees, by the mere act of submitting to arbitration, are not made personally liable. *Davies v. Ridge and others*, 3 Esp. C. 201.

3. No action at law will lie against trustees either by their *cestui que trust*, or in case of his bankruptcy, by the assignees of such *cestui que trust*. *Allan v. Imlett*, 1 Holt, 641.

## TURNPIKE.

Weighing  
carriages.

A waggon returning from *London* loaded with dung is not liable to be weighed and charged for overweight under 13 G. 3. c. 84. or 14 G. 3. c. 82. by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day. *Chambers v. Eaves*, 2 Camp. 393.

## USE AND OCCUPATION, ACTION FOR.

When it lies.

1. In an action for use and occupation, where the defendant has come in under the plaintiff, he cannot shew that the plaintiff's title has

has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. *Balls v. Westwood*, 2 Camp. 11.

2. In an action for use and occupation, where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. *Cobb v. Carpenter*, 2 Camp. 13. n.

3. Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and, on the faith of such assurance at a considerable expence enters into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term) be charged in an action for use and occupation. *Hearn v. Tomlin*, Peake, 192. When not.

4. Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation. *Smith v. Raleigh*, 3 Campbell, 513.

5. *A.* lets lands to *B.* who underlets to *C.* and others; during these tenancies, *A.* gives notice to *C.* and the other undertenants to quit, and *C.* does quit, and the lands before occupied by him remain unoccupied for a year, and are then again let by *B.*: — Held, that *A.* could not recover against *B.* for the use and occupation of this land for the year. And *semble*, that under these circumstances, an eviction might be set up as a defence to the whole demand. *Burn v. Phelps*, 1 Starkie, 94.

6. *A.* having an equitable title to a house under an agreement for the lease of it, permits his mistress to occupy it; it is afterwards agreed between them that she shall take up the bills which he has accepted in part payment of the purchase money, and that the lease shall be assigned to her, she remains in possession and does not take up the bills, and marries the defendant, who occupies the house: *A.* cannot recover against the defendant for use and occupation. *Keating v. Bulkely*, 2 Stack. 419.

## USURY.

1. If a country banker, discounting a bill, take interest for the whole time it has to run, and instead of paying money for the bill, give notes payable in London, at three days after sight, — such country banker is guilty of usury. *Matthews qui tam v. Griffiths*, Peake, 200. What shall be.

2. If on discounting a bill, it is agreed that goods shall be taken at more than their allowed value, the transaction is usurious. *Pratt v. Willey*, 1 Esp. N. P. C. 40.

3. A loan of money by taking stock at a higher price than it bears, is usurious. *Doe ex dem. Davidson v. Barnard*, 1 Esp. N. P. C. 11.

4. An agreement on discounting a bill, that the party shall take in part payment another bill, which has time to run as cash, although the full discount was taken, is usurious. *Parr v. Eliason* and others, 3 Esp. C. 210.; S. C. 1 East, 92.

5. Although a bill of exchange, *præsumptæ facie*, appears to be usurious, if this is shown to have arisen from the mistake of an agent employed

employed in the framing of the bill, (or *comme semble*, even by his deliberate act, the principals being ignorant of the intended usury,) it is not within 12 Ann. c. 16., and the holder may recover what is *bond fide* due upon it. *Glasfurd v. Laing*, Camp. 149.

6. A person accommodating another by accepting a bill, cannot, like a country banker discounting a bill, take any thing above 5*l.* per cent. interest, by way of commission, without committing usury. *Kent v. Lowen*, 1 Camp. 178.

7. Where a factor advances money to purchase goods, if he receives, besides legal interest, a higher commission on these purchases than he would have been contented to take had he not advanced the money, the transaction is usurious. *Harris v. Boston*, 2 Camp. 348.

8. *Semble*, that lending money on continuation is usurious. *Smedley v. Roberts*, 2 Camp. 607.

Usury ; what is.

9. An agreement, that upon the advance of a sum of money by *B.* to *A.*, *A.* shall assign to *B.* the lease of premises of greater value, with a power of redemption on re-payment of the money, and that in the mean time, *B.* shall grant *A.* an under-lease of the premises at a greater rent than the legal interest of the money, — *A.* insuring the premises, and paying the ground-rent and taxes, — is usurious ; and the assignment of the lease, executed under such agreement, is void. *Doe ex dem. Telford v. Chambers*, 4 Campbell, 1.

What not.

10. An agreement by a defendant after judgment against him, that if the plaintiff will forbear the debt and costs, he will pay him the difference between the costs actually expended and those taxed, is not usurious, though the difference exceeds the legal interest on the sum for the time. *Barnett v. Stone*, 3 Esp. C. 209.

11. The acceptor of a bill, dated 4th *July*, and due 7th *September*, by taking a premium of 6*d.* in the pound from the indorse and holder for payment of the bill on the 20th *August*, before it was due, is not guilty of usury ; there being no loan or forbearance. *Berkley v. Walmsley*, 5 Esp. C. 11. ; S. C. 4 East, 55.

12. An agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious ; since contingency in the thing purchased is incompatible with the idea of usury, to which it is essential that the principal be certain. *Pike v. Ledwell and another*, 5 Esp. C. 154.

13. If one acting as a broker, get bills discounted by another person at legal interest, the transaction is not usurious, however large a commission he may himself receive. Therefore, where the acceptors of a bill of exchange, tainted by usury, applied to the drawer to discount other bills for them, to enable them to take it up, and he agreed to get them discounted by another person receiving for himself 10*s. per cent.* beyond the legal interest, and bills were accordingly accepted by them, which he got discounted pursuant to the terms of the agreement, — it was held that these bills were valid in the hands of a *bonâ fide* indorsee, although the person who got them discounted was liable to a penalty for taking excessive commission. *Dagnall v. Wylie*, 2 Camp. 33.

14. An agreement that *London* bankers "should accept and pay bills of exchange drawn in the country for a commission of 5*s. per cent.* being furnished with funds to pay the bills before they became due," cannot be usurious, there being no contemplation of an advance of money. But if upon such an agreement an advance of money were contemplated, it would be a question of fact whether the commission was a shift to obtain more than legal interest for the  
for-

forbearance, or a compensation for the trouble and expence incurred, in accepting and paying the bills of exchange. *Masterman and others v. Cowrie*, 3 *Campbell*, 488.

15. *A.* in consideration of a certain sum of money, conveys premises to *B.*; and, at the same time, an agreement was entered into between them, that *A.* shall re-purchase the same premises, within fifteen months, at a considerable advance upon the original purchase money; and *B.* agrees to sell and re-convey at such advance: Held that, in point of law, such contract was not usurious, unless it were meant as a cover for a loan of money, which was a question of fact for the jury. *Doe ex dem. Metcalf v. Brown and others*, 1 *Holt*, 295.

16. Whether goods given in discounting a bill are a cloak for usury, is a question for the jury; and that they are, is not of course from their having been charged high. *Rich and another v. Topping*, 1 *Esp. N. P. C.* 177.

The question of usury, by whom determined.

17. Where two bills are discounted by an entire sum, exceeding legal interest, since it cannot be distinguished how much was paid on each, the defence of usury cannot be set up to an action upon one of them. *Hattam v. Withers*, 1 *Esp. C.* 259.

In relation to apportionment.

18. Where money is lent by a cheque upon a banker, without a previous agreement to consider the cheque as cash, there is no loan or forbearance within the statute of usury, till cash is actually received for the cheque. Therefore in debt on 12 *Ann. st. 2. c. 16.* where the declaration stated, that the defendant forbore a sum of money from the 20th of *April*, and it appeared, that having previously received at his residence in the country a bill to be discounted for a house in *London*, he, on the 20th, sent off a letter for them by the post, inclosing cash notes, or cheques, on *London* bankers, for the sum in question, which did not reach *London* till the 21st: this was held to be a fatal variance. *Brooke q. t. v. Middleton*, 1 *Camp.* 145.

Pleadings.

19. In an action for usury, the forbearance was laid to have been from the 21st *April*. On that day, the borrower received from the defendant, as part of the sum lent, a cheque, which was void for want of a stamp. This the borrower the same day paid into his bankers, who immediately gave him credit for the amount, but who did not themselves receive payment of it till the following day: Held, that as to this sum there was no forbearance till the 22d, and that there was thus a fatal variance between the declaration and the evidence. *Borrodaille q. t. v. Middleton*, 2 *Camp.* 53.

20. If *A.* for an usurious consideration give his promissory note to *B.* who transfers it to *C.* for a valuable consideration, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount the bond is good. *Cuthbert and another v. Haley*, 3 *Esp. C.* 22.; *S. C.* 8 *T. R.* 390.

Collateral contract.

21. A note given in lieu of another, tainted with usury, is good, unless given itself to cloak the original transaction. *Turner v. Hulme*, 4 *Esp. C.* 11.

22. Whether, if money be lent at usurious interest, a subsequent contract to repay the principal with legal interest be void, under 12 *Ann. c. 16. s. 1.* *Barnes v. Headley*, *Wright v. Wheeler*, 1 *Camp.* 157. 180. d. 165. n.



## VENDOR AND PURCHASER OF REAL PROPERTY.

### Construction of the contract.

1. If it is provided by conditions of sale, that any error or mis-statement in the particular shall not vitiate the sale, but that an allowance shall be made for it in the purchase money, this will be extended only to any error or mis-statement, inserted through ignorance or inadvertency, and the sale will still be vitiated by a mis-statement, introduced with a view to raise the apparent value of the premises. *Duke of Norfolk v. Worthy*, 1 Camp. 340.

2. In the conditions of sale of the lease of a public house, it was described as "*a free public house*:" the lease contained a covenant, that the lessee and his assigns should take their beer from a particular brewer: this lease was all read over by the auctioneer at the time of the sale, who said mistakenly, that it was *a free public house*, and that the covenant about the beer had been decided to be bad. Held, that a purchaser who heard the lease read over, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. *Jones v. Edney*, 3 Campbell, 285.

### Auction.

3. Where there was a written agreement to sell and assign "the unexpired term of eight years' lease and good will" of a public house: Held, that the purchaser could not refuse to perform the agreement, on the ground that when it was entered into, there were only seven years and seven months of the term unexpired. *Belworth v. Hassell*, 4 Campbell, 140.

4. The vendor of newly inclosed lands, undertakes to convey them to the vendee: Held, that this was an undertaking to convey the legal estate; and the vendor having only an *equitable* interest previous to the assignment by the commissioners, the vendee is entitled to recover his deposit. *Cane v. Baldwin and others*, 1 Starkie, 65.

5. The premises intended to be conveyed by a deed of mortgage are described as the defendant's undivided moiety, &c.; the deed afterwards professes to convey all the defendant's estate, &c. in the premises. This conveys the moiety only, to which the defendant was entitled in his own right, and not one-third part of the same premises in which he was interested as a co-trustee with the lessors of the plaintiff. *Doe ex dem. Raikes and others v. Anderson*, 1 Starkie, 155.

6. In an agreement for the sale of leasehold premises, to be paid for by instalments, is stipulated that in default of payments of the instalments at specified times, the former instalments shall be forfeited, and the vendor shall not be compellable to convey. The forfeiture enures to destroy every right which the vendee took under the agreement, but does not affect any right of possession which he had before. And no previous right being proved, *semble*, the party, after forfeiture, is a mere tenant by sufferance, and it is sufficient for the owner, previous to an ejectment, to enter upon the premises, indicating his intention to take possession without making any formal demand of possession. *Doe ex dem. Moore v. Lauder*, Starkie, 308.

### Deposit.

7. *A.* as the agent of *B.* the owner of a landed estate, enters into an agreement for the sale of it with *C.*, who appears to act on his own account, but in fact is the agent of *D.*, and *A.* and *C.* bind them-

themselves in a penalty for the performance of the agreement, whereupon C. pays A. part of the purchase money as a deposit: Held, that upon a breach of the conditions of sale on the part of the vendor, an action for money had and received lies at the suit of D. against B. to recover back the deposit, without proof of the money being paid over by A. to B. *Duke of Norfolk v. Worthy*, 1 Camp. 337.

8. Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale. *Granger v. Worms*, 4 Campbell, 83.

9. Where several houses are purchased by the same person at an auction, though in distinct lots, the contract is entire; therefore the whole purchase may be rescinded if the vendor fails in making out his title to any one. *Chambers v. Griffiths and another*, 1 Esp. N. P. C. 150.

Entirety of contract.

10. Where different lots are sold at an auction for different sums, the contracts are separate both in law and fact. And in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. *James and another v. Shore*, 1 Starkie, 426.

11. A man is not obliged to accept a conveyance where the title is doubtful. *Hartley v. Pckall*, Peake, 131.

Title.

12. A person bound to accept a conveyance may refuse one executed by procuration, since his proofs are thereby multiplied. *Coore v. Callaway*, 1 Esp. N. P. C. 115.

13. If the vendor of property having no title at time of sale, obtains one before he is called upon to complete the purchase, it is sufficient. *Thomson v. Miles*, 1 Esp. N. P. C. 185.

14. The vendor of an estate must be prepared without any notice to produce the title-deeds at the appointed day; unless a court of equity has enlarged the time. *Berry v. Young*, 2 Esp. C. 641. n.

Title-deeds.

15. Though the vendee of property may have no right to the possession of title-deeds, he has to inspection, which the vendor must procure. *Berry v. Young*, 2 Esp. C. 641. n.

16. Although it is usual for the solicitor of the vendor of an estate sold at a master's office to procure the confirmation of the sale in the Court of Chancery, to the expence of which the vendee is liable, the vendee may, if he choose, employ his own solicitor to transact the business. *Devon and others v. Fricker*. 2 Stark, 170.

Conveyance.

17. If on a treaty for the purchase of an annuity to be secured on an estate, the existing incumbrances are represented by the grantor as less than in reality they are, the purchaser, on discovering the misrepresentation, may recover against him the expences of preparing conveyances, and the interest of the money procured for the purchase. *Richards v. Barton*, 1 Esp. C. 268.

Misrepresentation.

18. Where a statute points out the particular manner in which a canal company shall sell and convey lands, and enacts that every such sale and conveyance shall be valid and effectual to all intents and purposes, this does not cure any defect in the title to lands so sold and conveyed by the company. *Ward v. Scott*, 3 Campbell, 284.

Canal company.

19. The purchaser of an annuity by the Waterloo Bridge Company, which is described as well secured and payable out of the first tolls received, and is not described as a redeemable annuity, cannot afterwards

Waterloo Bridge Company.

afterwards object to the completion of the purchase on the ground of misdescription, provided the annuity has been granted in conformity with the act. *Coverley v. Burrell*, 2 Stark. 295.

Pleadings.

20. In suits against vendees of real property for not completing the purchase, the sale of the substantial parts of the premises only, and not of appurtenants or matters collateral thereto as well, need be stated. *Thomson v. Miles*, 1 Esp. N.P.C. 184.

## VENDOR AND PURCHASER.

Sale.

1. If a broker deliver a bought and sold note which materially differ, there is no valid contract. *Cumming v. Roebuck*, 1 Holt, 172.

2. Where the broker makes a mistake in the contract, describing, in the bought and sold notes, goods to be sold by *A. B.* and *C.* which he believed to be the real name of the firm which employed him, which firm, in fact, from a recent alteration that the broker was not privy to, consisted of *A. D.* and *E.* only. Held, that the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting upon a subsequent communication from the plaintiff, unless he could show that he was prejudiced, or had lost the benefit of a set-off. *Mitchell and others v. Lapage*, 1 Holt, 253.

3. Where a broker is authorized by one man to sell goods, and to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is in general a binding contract between the parties. The bought and sold note, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract. *Heyman v. Neale*, 2 Camp. 337.

4. The authority of the broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the statute of frauds, although he has previously entered into a verbal agreement to sell the goods. *Farmer v. Robinson*, 2 Camp. 339. n.

5. A contract is entered into for the sale of a ship and a quantity of iron kintlage for the sum of 1600*l.*; but eventually a bill of sale is executed of the ship, together with all her stores, &c. in the usual form. In an action of *assumpsit* on the sale of the ship and kintlage, for the non-delivery of the kintlage, the bill of sale is the only contract that can be considered as obligatory on the parties, and the plaintiff cannot recover. *Lano v. Neale*, 2 Stark. 105.

6. The agent of the vendor of a picture, knowing that the vendor labours under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion. The sale is void. *Hill v. Gray*, 1 Starkie, 434.

7. A deed by which a felon on the eve of his trial for a capital offence assigns his property to another, cannot be supported without proof of consideration. *Shaw v. Bran*, 1 Starkie, 319.

Sale by sample.

8. In the sale of goods by sample, if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods on any terms; although no fraud was intended on the part of the vendor, and although the custom may have been that, under such circumstances,

circumstances, the bargain shall stand good, upon an allowance being made for the inferiority. *Hilbert v. Shee*, 1 Camp. 113.

9. Where, upon a sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, if there be a sale note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action on the case for a deceitful representation. *Mayer v. Everth and another*, 4 Campbell, 22.

10. If there be a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods. *Boyd v. Siffkin*, 2 Camp. 326. *Hawes v. Humble*, 2 Camp. 327. n.

Construction of contract.

11. If it is stated generally in a bought and sold note, that the goods are to be paid "by bill," evidence cannot be received to show that by "bill" is meant an approved bill: and *semble*, that an approved bill is a bill to which there is no reasonable objection, and that ought to be approved, 2 Camp. 532.

12. If a ship is sold with all faults the seller is not liable to an action in respect of later defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser. *Baghole v. Walters*, 3 Camp. 154.

13. Where, in a contract for the sale of sugar, there is the following term; "free or board a foreign ship;" the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name. *Wackerbarth v. Masson*, 3 Campbell, 270.

14. Contract in *London* for the sale of tallow from a particular ship on arrival—to be taken from the king's landing scale—if it should not arrive on or before a given day, the bargain to be void. The ship was wrecked off the coast of *Scotland*, but the cargo was saved, and might have been forwarded to the port of *London* by the given day; the vendors resold the tallow in *Scotland*; the purchasers did not offer them any indemnity if they would bring the tallow to *London*: Held, that under these circumstances the vendors were not answerable for the non-delivery of the tallow. *Idle and others v. Thornton and others*, 3 Campbell, 274.

15. Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description, it is not material for the vendor to show that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract. *Tye v. Fynmore*, 3 Campbell, 462.

16. Although a ship be sold, "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. *Schneider and another v. Heath*, 3 Campbell, 506.

17. If, before or at the time of sale, a specimen of the goods is exhibited to the buyer, there being a written contract which nearly describes the goods as of a particular denomination;—this is not a sale by sample; but there is an implied warranty, that they shall be of a merchantable quality, of the denomination mentioned in the contract. *Gardiner v. Gray*, 4 Campbell, 144.

18. Where

18. Where goods are ordered of a *manufacturer* in *England* to be exported to a foreign country, and the purchaser has no opportunity of seeing them before they are shipped, there is an implied undertaking on the part of the manufacturer, that they shall be of a merchantable quality. *Laing and another v. Fidgeon and another* 4 Camp. 169.

19. A stipulation in a contract for the sale of flax, that "as soon as the seller knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer," forms a condition precedent: and where the seller had advice of the name of the ship in *London* on the 12th of the month, and did not communicate it to the buyer who resided at *Hull* till the 20th, held that the condition was broken, and that the buyer was released from the contract, although he did not appear to have sustained any damage by the delay. *Busk v. Spence*, 4 Camp. 329.

20. A contract for the sale of flax expected from *Petersburgh*, contained a stipulation "that the flax should be dispatched from *Petersburgh* not later than 31 July, O. S., either for *Hull* or *London*:" Held to be enough that, before the day specified, the flax had been sent down from *Petersburgh* in lighters and put on board the ship at *Cronstadt*, although she was not dispatched on her homeward voyage till after the day. *Busk v. Spence*, 4 Camp. 329.

21. A vender of goods is bound by the contract, as stated in the note signed by him, and delivered by the broker who effected the sale to the vendor; although this note varies from the note delivered by the broker to the vendee. *Rowe v. Osborne*, 1 Starkie, 140.

22. *A.* sells to *B.* a bowsprit, which at the time of sale appears to be perfectly sound, but which, after having been used some time, turns out to be rotten. In the absence of fraud, *A.* is entitled to recover from *B.* what the bowsprit was apparently worth at the time of delivery. *Bluett v. Osborne and another*, 1 Starkie, 384.

23. *B.* agrees to purchase of *A.* a gun for the sum of forty-five guineas; but it is stipulated that *A.* shall take a gun of *B.*'s, valued at thirty guineas in part payment. *B.* having refused to deliver his gun and complete the contract, *A.* is entitled to recover the sum of forty-five guineas as the stipulated price. *Forsyth and others v. Jervis*, 1 Starkie, 439.

24. Goods sold are described in the invoice as *scarlet cuttings*; a warranty is to be inferred that the goods answered the known mercantile description of scarlet cuttings. *Bridge v. Wain*, 1 Starkie, 504.

25. Goods sold at three months' credit, the vendor agreeing to take the vendee's bill of exchange at three months' date at the end of the first three months, if he wished for further time, unless the vendee give such a bill at the end of the first three months, the vendor may bring his action immediately. *Nickson v. Jepson*, 2 Starkie 227.

26. The vendor of a ship represents her to have been built in 1816, although in fact she has been launched a year earlier, the vendee is entitled to recover damages for the deceit, although the ship was to be taken with all faults. *Fletcher and another v. Bowsher and others*, 2 Starkie, 561.

27. If separate articles are sold under one entire contract, payment of the price of any one article vests in the purchaser the property in the whole. *Wright v. Lawes*, 4 Esp. C. 82.

28. Goods sold remain at the risk of the seller, while any thing is to be done to them by him, to ascertain the amount of the price.

Therefore

Therefore where 289 bales of skins (stated in the contract to contain five dozen in each bale) were sold at 4*l.* 17*s.* 6*d.* a dozen; and it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any numeration took place, the whole were consumed by fire; held, that an action could not be maintained against the purchaser for the value of the skins, and that the loss fell entirely upon the seller. *Zagury v. Furnell*, 1 Camp. 240.

29. A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgement that he so holds it, cannot set up as defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is remeasured, and that before the malt in question was remeasured, the seller became bankrupt. *Stonard v. Dunkin*, 1 Camp. 344.

30. If goods are sold to be paid for in 30 days, and if not carried away at the end of that time, warehouse rent to be paid for them, the property in the goods vests absolutely in the purchaser, and they remain at his risk from the moment of the sale. *Phillimore v. Barry*, 1 Camp. 513.

31. As soon as goods are delivered to a carrier they are at the risk of the purchaser, although the carrier be paid by the vendor. *King v. Meredith*, 2 Camp. 639.

32. A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner, as to furnish a remedy over against the wharfinger. *Brickman v. Levi*, 3 Camp. 414.

33. The vendee of goods recovers their value in an action of trover against the captain of the vessel, to whom they have been delivered on the vendee's account: he cannot afterwards, in an action brought by the vendor for the amount, contend that there has been no delivery to him; although the captain refused to deliver the goods at the instance of the vendor, and although the vendee has not had judgment in the action of trover. *Groning and others v. Mendham*, 1 Starkie, 299.

34. A vendee at *Aberystwith* gives an order for goods to the traveller of the plaintiff, who is a dealer in *London*; nothing is said about the mode of carriage: it is presumed to be that the goods are to be sent in the most usual and convenient way; and therefore upon the delivery of the goods to a carrier in *London*, a cause of action lies in *London*. *Copeland v. Lewis*, 2 Starkie, 33. Transit.

35. *A.* by the direction of *B.*, purchases coffee for *B.* which is to be delivered at *Leghorn* to *B.*'s order; the coffee is accordingly sent to *Leghorn*, and is sold there by *A.*'s agents and by his direction; *B.* may maintain trover against *A.* for the conversion of the coffee, although the price has not been actually tendered to *A.* *Payne v. Brander*, 2 Starkie, 568.

6. The vendor of goods sold on credit, cannot sue for the price until the time has expired, unless the goods were bought with the view of defrauding him. *Secus*, where he has only given a voluntary promise of credit, making no part of the contract of sale. *De Symons v. Minchwick*, 1 Esp. C. 430. Payment.

37. It is not an entire waiver of a condition to be paid for goods on delivery, that the vendor allowed the purchaser to carry away part of the goods without being paid for them. *Payne v. Shadbolt*, 1 Camp. 427.

38. One

38. One who has agreed for the sale of 100 sacks of flour, cannot, after delivery of part, recover for that part, the defendant being willing to receive and pay for the whole. *Walker v. Dixon*, 2 Starkie, 281.

Resale of subject matter.

39. Although the purchaser of goods neglects after notice, to carry them away, the seller has no right on that account to resell them. *Greaves v. Ashlin*, 3 Camp. 426.

Rescission of contract.

40. As soon as the purchaser of goods discovers that they do not answer the order given for them, he ought to return them to the vendor, or send him notice to take them back; and if he does neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purposes for which he ordered it. *Fisher v. Samuda*, 1 Camp. 193.

41. If goods in the city of *London* are sold by a broker, to be paid by a bill of exchange, the vendor has a right, within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract. The vendor, however, must intimate his dissent, as soon as he has had an opportunity to enquire into the solvency of the purchaser. Five days considered too long a period for this purpose. *Hodgson v. Davies*, 2 Camp. 530.

42. Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury, whether the vendee, who complains that they are unfit for the purpose for which they were intended, has used them farther than was necessary, in order to give them a fair trial. And if he has not, the commodity being bulky, and after a reasonable trial found to be unfit for such purpose, the vendor, upon notice given, is bound to take them away; but if the vendee retain the utensils, without giving such notice, he is liable to pay for the value of the materials. *Okell v. Smith and another*, 1 Starkie, 107.

43. It is a question for the jury, whether the vendee of goods which turn out to be of a quality inferior to that which was stipulated for, has in point of fair mercantile dealing, given a notice sufficiently early to the vendor of his intention to repudiate the contract. *Rowe v. Osborne*, 1 Starkie, 140.

44. The vendee of a merchantable commodity warranted to be of the best quality, proceeds to use it from time to time till the whole has been consumed, when the value of the article can no longer be ascertained, having given no notice to the vendor during this time of any defect in the article, and having deprived the vendor of the means of proving the value of the article by proper tests, the vendee is not entitled to recover on the ground of any alleged defect in the article. *Hopkins v. Appleby*, 1 Starkie, 477.

45. *A.* contracts to sell to *B.* 50 tons of hemp, to be shipped from *Cronstadt* or *St. Petersburg*, the ship's name to be declared as soon as known, and to arrive before the 31st of *December*. On the 5th of *September* *A.* gives notice to *B.*, that the hemp was shipped on board the *Lively*; on the 20th he sends a second notice, that if the quantity did not come by the *Lively*, he would make it up from the cargo of another vessel. On the 29th *A.* gives a third notice that twenty tons would come by the *Lively*, and the rest by another ship. *B.* accepts the twenty tons, but refuses to receive any more: Held that *B.* was bound to receive the remainder of the hemp, unless he could show, that he had sustained some special damage by *A.*'s non-performance of the precise terms of the contract. *Thornton and others v. Simpson and others*, 1 Holt, 164.

*Bona fide* purchaser.

46. The owner of goods sends them to a wharf in the borough of *Southwark*,

*Southwark*, where goods of the same sort are usually sold: the wharfinger, without any authority, sells them to a *bond fide* purchaser, who duly pays for them. This is not a sale in market overt to change the property, and trover lies for goods at the suit of the owner against the purchaser. *Wilkinson v. King*, 2 Camp. 335.

47. A complaint having been made to a magistrate by *A.*, the owner, that his horse has been stolen by *B.*, an officer, although armed with a warrant against *A.*, is not justified under the statute 31 E. c. 12. s. 4. in taking the horse out of the possession of a *bond fide* purchaser from *B.* *Joseph v. Adkins*, 2 Starkie, 76.

### VENUE.

As to the venue in a criminal information against an officer for a false return sent from abroad to the Navy-office, see *Rex v. Munton*, 1 Esp. N. P. C. 63. Information.

### VESTRY.

1. The rector or vicar is not an integral part of the vestry; therefore, though absent, their resolutions are valid. *Mawley v. Barbet* and another, 2 Esp. C. 687. How composed.

2. The resolutions of a former vestry may be rescinded by a subsequent one; but they are binding until annulled. *Mawley v. Barbet* and another, 2 Esp. C. 687. Rescission of resolutions of.

### WAGER.

1. An action lies on a wager on a horse-race, if neither of the sums betted by the parties amounts to 10*l.*, and the race itself is run for the sum of 50*l.* or upwards. *M'Allester v. Haden*, 2 Camp. 438. When valid.

2. An action may be maintained upon a wager of a rump and dozen, whether the defendant be older than the plaintiff. And when a dinner is ordered at a tavern by the authority of two persons, who have laid a wager of a rump and dozen, if the winner pays the bill, he may maintain an action against the loser for money paid to recover the amount. *Hussey v. Crickitt*, 8 Camp. 168.

3. An action cannot be maintained on a wager, on a point of law in which the parties have no interest. *Henkin v. Gerss*, 2 Camp. 408. When invalid.

4. No action can be maintained upon a wager on a cock-fight. *Squires v. Whisken*, 3 Camp. 140.

5. On a wager that *A.* will trot two horses sixteen miles in two successive hours, he may trot them in any manner he thinks proper. *Robson v. Hall*, Peake, 127. Construction of.

6. An action cannot be maintained to recover back money deposited with a stake-holder upon a wager, after the wager has been determined against the plaintiff. *Brandon v. Hibbert*, 4 Camp. 37. Rescission of.

7. The party who lays a wager on the identity of a person with whom he has conversed, cannot set it aside on the ground that at the time when it was laid, the opposite party had received certain information that he was mistaken; and it is too late for him, on discover-



ing his mistake, to countermand the authority of the stake-holder, to pay over the money betted. *Bland v. Collett*, 4 Camp. 157.

Pleadings.

8. Where money betted is paid into the hands of a banker, who gives a receipt to the persons betting as received of them, the winner cannot recover on the common count on a wager, but must state that the money was so paid, and that the defendant refused to permit him to receive it. *Robson v. Hall, Peake*, 128.

## WARRANTY.

What is.

1. Setting the names of artists opposite those of pictures in a catalogue offered for sale, is not to be taken as a warranty, that they were painted by them. *Jendevine v. Slade*, 2 Esp. C. 572. *Sed, quære*, unless the action was on the *scienter*, which is probable from page 573.

What is not.

2. If a man, not knowing the age of a horse, but having a written pedigree, which he received with him, sell him as a horse of the age stated in the pedigree, at the same time stating he knows nothing of him but what he has learnt from the pedigree, he is not liable to an action when it appears that the pedigree is false. *Dunlop v. Waugh, Peake*, 123.

3. Where a customer who had bought a quantity of burgundy of excellent quality from a wine-merchant, some time after procured him to exchange a portion of it for wine of a different description: Held, that there was no implied warrant on the part of the customer as to the state of the wine at the time of the exchange; and that, although it had then become quite sour, the wine-merchant had no remedy without proof, that the other knew its deteriorated condition and intended to practise a fraud. *La Neuville and another v. Nourse and another*, 3 Camp. 351.

What shall be a breach of.

4. A temporary lameness, rendering a horse less fit for present service, is a breach of a warranty of soundness. *Elton v. Brogden*, 4 Camp. 281.; *S. C.* 1 Starkie, 475. by the name of *Elton v. Jordan*.

What not.

5. A horse labouring under a temporary injury, capable of being speedily cured, is not unsound within the meaning of a warranty of soundness. *Garment v. Barrs*, 2 Esp. C. 673.

6. Roaring is not unsoundness in a horse, unless it be shown to proceed from some disease or organic defect. *Basset v. Collis*, 2 Camp. 523.

7. Crib-biting is no such unsoundness in a horse as to entitle a purchaser who has bought under a general warranty to maintain an action for the breach of it upon this fault only. *Broennenburh v. Haycock*, 1 Holt, 630.

Of returning the article.

8. If a warranty on the sale of a horse proves false, and the purchaser, instead of returning him immediately, keeps him until he grows worse, whether from physic or otherwise, he cannot, by afterwards offering to return him, rescind the contract, but must pay the price, and sue on the warranty. *Curtis v. Hannay*, 3 Esp. C. 82.

9. In an action on the warranty of a horse, the plaintiff is not entitled to recover for the expence of keeping the horse, unless, on discovering the unsoundness, he offered to return him to the defendant. *Caswell v. Coare*, 2 Camp. 82.

## WASTE.

1. It is waste for an outgoing tenant of garden-ground, to plough up strawberry-beds in full bearing, although when he entered he paid for them, on a valuation, to the person who occupied the premises before him, and although it may have been usual for strawberry-beds to be appraised and paid for as between outgoing and incoming tenants. *Watherell v. Howell*, 1 Camp. 227. What is.

2. An action on the case in the nature of waste, lies at the suit of a landlord against his tenant, for acts done by the latter while holding over after the expiration of a notice to quit. *Burchell v. Hornsby*, 1 Camp. 360. Action in the nature of.

## WATCHMAN.

A watchman is not justified in taking into custody for talking loud in passing along the street. *Hardy v. Murphy and another*, 1 Esp. C. 294. Arrest by.

## WATERCOURSE.

After twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground; and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water to the spring is diminished. *Balston v. Bensted*, 1 Camp. 463. Title to.

## WAY.

A right of way for agricultural purposes, is a limited and qualified right of way, and does not, necessarily, confer a right to use such way for general and universal purposes; therefore, where *A.* claimed, and proved a right to carry corn and manure over the *locus in quo*: Held, that he had not therefore a general and unlimited right to carry lime, or the produce of a quarry, over the *locus in quo* at all times and for all purposes. *Jackson v. Stacey*, 1 Holt, 455. Extent of the right to.

## WEST INDIA DOCK COMPANY.

A letter from the plaintiff's attorney to the secretary of the *West India Dock Company*, claiming the delivery of some coffee, in the possession of the Company, at their Docks, adding, "that he was instructed to take legal measures, if it were not delivered forthwith," is not a notice of action, within the meaning of the 39 Geo. 3. c. 69. s. 185.; the act which incorporates the Company? *Quære*, if the notice of action should not be to the treasurer of the Company. *Lewis v. Smith*, 1 Holt, 27. Action against.

WHARF.

## WHARFINGER.

## Liability of.

1. The liability of a wharfinger, who undertakes to convey goods from his wharf to the vessel, in his own lighters, is similar to that of a carrier. *Maving v. Todd and others*, 1 Starkie, 72.

2. If a wharfinger accept goods from a hoyman, he is answerable to the owner for them. *Wardell v. Mourillyan*, 2 Esp. C. 695.

3. *A.* deposits goods in the warehouse of *B.*, a wharfinger, for the purpose of sale by *B.*, who is paid 10*l.* per annum for warehouse rent, and receives a commission on the sale; *B.* having issued the goods, which are afterwards burnt in the warehouse, and having received the amount from the insurer, is liable to *A.*, for such money had and received to his use. *A.* deposits goods in the warehouse of *B.*, a wharfinger, and pays an annual rent for part of a particular warehouse, *B.* removes the goods into another warehouse, where they are burnt; *quære*, whether *B.* is liable to *A.* for the amount? *Sideways and another v. Todd and another*, 2 Starkie, 400.

## Notice by, in discharge of liability.

4. A wharfinger, by inserting in his receipts for goods, a notice that he will not be responsible for loss by fire, may entirely discharge himself from such responsibility. *Maving v. Todd and another*, 4 Camp. 223.; S. C. 1 Starkie, 72.

## WINDOW.

## Right to.

1. The uninterrupted enjoyment of lights for 20 years, or perhaps less, confers a possessory title. *Cotterell v. Griffiths*, 4 Esp. C. 71.

2. If a building, after having been used for 20 years as a malt-house, is converted into a dwelling-house, in its new state it is entitled only to the same degree of light which was necessary to it in its former state, and the owner of the adjoining ground may lawfully erect a wall which prevents the admission of sufficient light for domestic purposes, if what is still admitted would be enough for the making of malt. *Martin v. Goble*, 1 Camp. 322.

3. If an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window, than was anciently enjoyed. *Chandler y. Thompson*, 3 Camp. 80.

4. *Semble*, that no action lies for opening a window looking into and destroying the privacy of a neighbour's premises, unless under the prohibition of a custom. *Cotterell v. Griffiths*, 4 Esp. C. 69.

## Obstruction of the right.

5. An act which in any degree tends to deprive an ancient window of the quantity of light and air it is entitled to, is injurious. *Cotterell v. Griffiths*, 4 Esp. C. 69.

## Extinction of the right.

6. If an ancient window has been completely shut up with brick and mortar above 20 years, it loses its privilege. *Lawrence v. Obee*, 3 Camp. 514.

THE END OF THE FIFTH VOLUME.









